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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 55

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, CHAUNCEY L. BAKER, WILLIAM H. PETERS, JR., AND J. DRISCOLL DEWITT, APPELLANTS,

vs.

NEW YORK STATE LABOR RELATIONS BOARD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MARCH 12, 1946.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner-Respondent,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

STATEMENT UNDER RULE 234

This proceeding was commenced on February 8, 1945, by service on that date upon the above-named respondents of an order to show cause dated February 7, 1945. Affidavits in opposition to the application of the petitioner pursuant to said order to show cause were served on February 15, 1945.

The full names of the original parties are as set forth above, and there has been no change in the parties.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents.

NOTICE OF APPEAL

SIRS:

Please Take Notice that the respondents above-named hereby appeal to the Appellate Division of the Supreme Court for the Fourth Judicial Department from the order

made in the above-entitled action by Hon. Paul J. Batt and entered in the office of the Clerk of Erie County on or about the 1st day of March, 1945, granting the application of New York State Labor Relations Board, the petitioner herein, and requiring the respondent, Bethlehem Steel Company, to produce certain documents and evidence in a proceeding pending before the New York State Labor Relations Board entitled "In the Matter of Bethlehem Steel Company—and —Foreman's Association of America, Bethlehem Steel Chapter No. 50," and requiring the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear before a Trial Examiner designated by said petitioner and to testify and give cer-
[fol. 3] tain evidence in said proceeding, all as more specifically set forth in said order, and this appeal is taken from the whole and from each and every part of said order, except the part thereof which grants a stay.

Dated, March 2, 1945.

Yours, etc., Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y. Konefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents.

To: William E. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner. Clerk of the above-named Court.

[fol. 4] In Supreme Court of New York, County of Erie, Special Term, Part I

Present: Hon. Paul J. Batt, Justice

[Same title]

Order Appealed From

The petitioner, New York State Labor Relations Board, having applied for an order directing the respondent, Bethlehem Steel Company to appear and attend before a Trial Examiner of the New York State Labor Relations Board and there produce certain documents, records and other evidence pursuant to a certain subpoena duces tecum issued by said Board to said respondent, dated November 15, 1944, and duly served upon it, and directing the respondents

Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt to appear and attend before a Trial Examiner of the New York State Labor Relations Board and there testify and give evidence pursuant to certain subpoenas issued by said Board to said respondents, dated November 15, 1944, and duly served upon each of them, and said matter having duly and regularly come on to be heard before this Court,

Now, upon reading and filing the order to show cause made by Mr. Justice Parton Swift, dated February 7, 1945, the petition of the New York State Labor Relations Board duly verified on January 31, 1945, by Rev. William J. Kelley, O. M. I., Chairman thereof, the affidavit of Anne M. [fol. 5] Hanrahan duly sworn to on November 17, 1944, and seven exhibits annexed to the petition, in support of petitioner's application, and the affidavit of Edward F. Entwisle duly sworn to on February 15, 1945, and the affidavit of Chester A. McLain duly sworn to on February 15, 1945, and exhibits annexed to said affidavits in opposition thereto, and after hearing Wiliam E. Grady, Jr., Esq., attorney for the petitioner, by Frank M. Abbate, Esq., of counsel, in support of the application, and Cravath, Swaine & Moore, Esqs., and Kenefick, Cooke, Mitchell, Bass & Letchworth, Esqs., attorneys for the respondents, by Chester A. McLain, Esq., and D. J. Kenefick, Esq., of counsel, in opposition thereto, and the petitioner having withdrawn its application herein in so far as it relates to records concerning non-supervisory skilled, semi-skilled and unskilled employees, and due deliberation having been had thereon, and on filing the decision of the Court, it is, upon motion of William E. Grady, Jr., Esq., attorney for the petitioner,

Ordered, that the application of the petitioner be, and the same hereby is, in all respects granted; and it is further

Ordered, that the respondent Bethlehem Steel Company, by its general manager Edward F. Entwisle, appear and attend before a Trial Examiner of the New York State Labor Relations Board, at Hearing Room Part 4, State Office Building, in the City of Buffalo, State of New York, in the proceeding entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of America, Bethelehem Steel Chapter No. 50," on the 27th day of March, 1945, at 10 o'clock in the forenoon of the said day, [fol. 6] and at any adjourned date thereof, there to testify and give evidence in said proceeding now pending before

the said Board and bring and produce at such time and place the following:

> All payroll register sheets, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses and all other compensation paid to the categories of employees contained in Schedule A annexed hereto, during the month of October, 1944; or in the alternative a verified statement setting forth each of the said categories of employees in said Schedule A and their respective weekly, bi-weekly or monthly wages, salaries, bonuses and all other compensation paid to said categories during the month of October, 1944;

and it is further,

Ordered, that the above named respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, State of New York, in the proceeding entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50," on the 27th day of March, 1945, at 10 o'clock in the forenoon of said day, and at any adjourned date thereof, there to testify and give evidence in said proceeding now pending before the said Board concerning wages, salaries, bonuses and other compensation paid to the supervisory employees [fol. 7] of the respondent Bethlehem Steel Company in the plants known as the Lackawanna Plant; and it is further

Ordered, that the respondent Bethlehem Steel Company, by its general manager Edward F. Entwisle, attend before said Trial Examiner from day to day with said records until the Trial Examiner shall excuse such attendance, and that the respondents Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt attend before said Trial Examiner from day to day until said Trial Examiner shall excuse such attendance.

The order herein is stayed for a period of twenty (20) days in order to permit respondents to perfect an appeal to

the Appellate Division of the Supreme Court, Fourth Department, and in the event such an appeal is duly perfected by the respondents within said period then the stay is continued until such appeal is determined by said Appellate Division.

Enter.

Paul J. Batt, J. S. C.

Granted March 1, 1945. Harold E. Rubling, Spec. Dep. Clerk.

SCHEDULE A TO ORDER APPEALED FROM

Coke Oven Division (BA)

Ovens Department	Division Superintendent
	Assistant Division Superintendent
	General Plant Foreman
	General Battery Foreman

[fol. 8]

Ovens Department (Cont.)	Battery Foremen
	Coke Screen Foremen
	Heater Foremen
Shipping Department	Shipping Foreman
By-Product Department	General Foreman
	By-Product Foremen
	Tar Plant Foreman
	Benzol Foreman
	Benzol By-Product Foreman
Electrical Repair Department	Foreman
	Assistant Foreman
Coal Handling Department	Foreman
	Assistant Foreman
Mechanical Maintenance Department	Mechanical Repair Foreman
	Assistant Mechanical Repair Foremen
General Labor Department	Foreman
	Assistant Foreman
Boiler and Booster House	General Foreman
	Foreman
	Chief Clerk

Blast Furnace and Ore Dock Division (BB)

	Division Superintendent
	Assistant Division Superintendent
	Chief Clerk
Furnace Department	General Foreman
	Turn Foreman
	Assistant Turn Foremen
	Stock House Foremen
	Ladle House Foremen
	General Trestle Foreman
	Trestle Foremen
	Blowers

[fol. 9]

General Labor Department	General Foreman
	Pig Machine Foreman
	Turn Labor Foremen
Electrical Maintenance	Electrical Foreman
Gas Cleaning Department	General Gas Foreman
	Turn Foremen (Gas)
Mechanical Department	Master Mechanic
	Repair Foreman
	Assistant Repair Foreman
	Pipe Fitter Foreman
	Turn Foremen
	Ladle Repair Foreman
	(Repair Foreman (Ore Dock))
	Bridge Foreman
	Bridge Turn Foremen
Pig Iron Yard	Shipping Foreman
Ore Dock Department	General Foreman
	Turn Foremen
	Deck Foremen
	Chief Clerk

Open Hearth Division (BC)

General	Division Superintendent
	Scrap Inspection Foreman
	Chief Clerk
Open Hearth No. 1	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Crane Directors
	Charging Foremen
	Mixer Foremen
	Pit Foremen
	Stock Yard Foremen
	Assistant Stock Yard Foreman

[fol. 10]

Open Hearth No. 1 (Cont.)	General Labor Foreman
	Master Mechanic
	Mech. Turn Foremen
	(Electrical) General Foremen
	Assistant General Foreman (Electrical)
	General Material Foreman (no direct supervision)
	Chief Clerk
Open Hearth No. 2	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Mixer Foremen
	Charging Foremen
	Pit Foremen
	Stock Yard Foremen
	General Labor Foreman
	Master Mechanic
	Mech. Turn Foremen
	General Electrical Foreman
	Assistant General Electrical Foreman
	Chief Clerk
Open Hearth No. 3	Superintendent
	Assistant Superintendent
	Melter Foremen
	Melters
	Mixer Foremen
	Charging Foremen
	Pit Foremen
	Stock Yard Foremen
	General Labor Foreman
	General Maintenance Foreman
	Master Mechanic
	Mech. Turn Foremen

[fol. 11]

Open Hearth No. 3 (Cont.)	General Electrical Foreman
	Chief Clerk
Mould Yard	General Mould Yard Foreman
	Mould Yard Foremen (No. 1 Open Hearth)
	Mould Yard Foremen (No. 2 Open Hearth)

Rolling Mills Division

General (BGA)	Division Superintendent
	Master Mechanic
	Labor Foreman
	Chief Clerk
Mill No. 1 (44" and 32" Mills) (BG)	Superintendent
	Assistant Superintendent
	Chief Clerk
	Turn Foremen
	Master Mechanic
	Assistant Master Mechanic
	Repair Foreman
	Electrical Maintenance Foreman
	Labor Foreman
	Rollers
	General Finishing End Foreman
	Assistant Finishing End Foreman
	Turn Foremen
	Shipping Foremen
Nos. 2, 12 and 14 Mills (24", 28", and 14" Mills)	Superintendent
	Assistant Superintendent
	Mill Clerk
Maintenance	Mechanical Foreman
	Electrical Foreman

[fol. 12]

Mill No. 14	Turn Foremen
	Finishing End Foreman
	Rollers
Mills Nos. 2 and 12	Turn Foreman
	Rollers
	Labor Foremen
	Roll Build Foremen
Mills Nos. 6, 9 and 10 (12", 10" and 8" Mills)	Superintendent
	Assistant Superintendent
Maintenance	Master Mechanic
	Mechanical Foremen (Mill No. 6)
	Electrical Foremen
Shipping	Shipping Foreman
	Assistant Shippers
Mill No. 6 (12")	General Foreman
	Turn Foremen
	Rollers
	Finishing End Foremen
Mill No. 9 (10")	Turn Foremen
	Rollers
	Finishing End Foremen
Mill No. 10 (8")	Turn Foremen
	Rollers
	Finishing End Foreman
	Bar Finishing Foreman
Mills Nos. 7 and 8 (40" Blooming Mill and 30" and 21" Continuous Mills)	Superintendent
	Assistant Superintendent
	Superintendent's Clerk
	Turn Foremen
Maintenance	Master Mechanic
	Electrical Foreman
	Labor Foreman
Mill No. 8 (30" and 21")	Roller
Shipping	Shipping Foreman

[fol. 13]

54" Blooming Mill and 48" Grey Mills	Superintendent
	Assistant Superintendent
	Turn Foremen
	Master Mechanic
	Mechanical Foreman
	Electrical Foreman
	Labor Foreman
	Rollers (48" Mills)
Structural Shipping Yards (BX)	Superintendent
	Assistant Superintendent
	Chief Clerk
	Chief Schedule Clerk
	Turn Foreman
Maintenance	Master Mechanic
	Electrical Foreman
Shearing and Cold Saw	Foremen
Stocking and Shipping	Foremen (Stocking)
	Foremen (Shipping)
General Billet Yard (BJ and BK)	General Foreman
	Assistant General Foreman
	Chief Clerk
	Yard Foreman (General Billet Yard)
	Turn Foreman (New Billet Yard)
Splice Bar and Tie Plate Depf. (BO)	General Foreman
	Shipping Foreman
	Turn Foreman

Strip Mill Division (BS)

General	Division Superintendent
	Assistant to Division Superintendent
	Chief Clerk

[fol. 14]

Hot Mill	Superintendent
	Assistant Superintendent
	Slab Yard General Foreman
	Slab Yard Assistant General Foreman
	Slab Yard Assistant Foremen
	Heating Foremen
	Hot Mill Turn Foremen
	Rollers
	General Finishing Foreman
	Assistant General Finishing Foreman
	Floor Foremen (Sheet Finishing)
	Floor Foremen (Plate Finishing)
	Chief Shipper (Sheets and Plates)
	Assistant Chief Shipper (Sheets and Plates)
	Turn Shipper (Sheets and Plates)
Cold Mill	Superintendent
	Assistant Superintendent
	General Foremen
	Continuous Pickling Foreman
	Pickler Turn Foremen
	Hot Coil Shipping Foremen
	Rotary Shear Foreman
	Head Annealing Foremen
	Turn Annealing Foremen
	Assistant General Finishing Foreman
	Chief Shipper

[fol. 15]

Cold Mill (Cont.)	Assistant Chief Shipper
	Shipping Turn Foremen
	Bundler Foremen
Mechanical, Electrical and Labor Department for Hot and Cold Mills	Master Mechanic and Chief Electrician
	Assistant Master Mechanic
	Machine Shop Foreman
	Electrical Foreman (Hot Mill)
	Electrical Foreman (Cold Mill)
	Chief Motor Room Operator (Hot Mill)
	Mechanical Foreman (Hot Mill)
	Mechanical Turn Foreman (Hot Mill)
	Mechanical Foreman (Cold Mill)
	Mechanical Turn Foreman (Cold Mill)
	General Labor Foreman
	Labor Foreman (Hot Mill)
	Labor Foreman (Cold Mill)

Mechanical Division

General	Division Superintendent
	Assistant Division Superintendent
	Night Superintendent
	Construction Foreman
	Chief Clerk
Brickmasons	General Foreman
	Assistant General Foreman
	Brickshed Foreman
	Turn Foremen (Bricklayers)

[fol. 16]

Brickmasons (Cont.)	Bricklayer Gang Leaders
	General Labor Foreman
	Turn Labor Foreman
Mechanical Repair (Outside)	General Foreman Riggers
	General Foreman Pipe Shop
	General Foreman Carpenter and Paint Shop
	Assistant General Foreman Carpenter and Paint Shop
Mechanical Repair (Inside)	Foreman Machine Shop
	Assistant Foreman Machine Shop
	Foreman Forge Shop
	Foreman Tool Shop
	Foreman Locomotive Repair
	Foreman Scale Inspector
Boiler and Structural Repair	Foreman Boiler and Structural Repair
	Assistant Foreman Plate Structural Repair
	Assistant Foreman Boiler Structural Repair
	Welder Foreman Plate & Structural Repair
Pattern Shop	Foreman
	Assistant Foreman
Steam, Water and Air	General Foreman Boiler Houses
	Assistant General Foremen (Boilers)
	Turn Foremen (Boilers)

[fol. 17]

Steam, Water and Air (Cont.)	Turn Foreman (Water Purification)
	Turn Foreman (Repairs)
	General Foreman (Power)
	Assistant General Foreman
Narrow Gauge Locomotive	General Foreman
	Assistant General Foreman
	Foremen
Car Repair	General Foreman
	Assistant General Foreman
Foundry	General Foreman
	Assistant General Foreman
	Iron and Steel Foreman
	Core Room Foreman
	Chief Clerk
	Yard Division (CB)
General	Division Superintendent
	Assistant Division Superintendent
	Blasting Foreman
	Reclaiming Foreman
	Locomotive Crane Foreman
	General Foreman
	Foreman
	Gang Foremen
	Chief Clerk
	Roll Division
General	Division Superintendent
	Assistant Division Superintendent

[fol. 18]

Main Shop	Foreman
	Turn Foreman
Merchant Mills	Foreman
	Assistant Foreman
	Turn Foreman
#15 Mill	Foreman
	Assistant Foreman
Strip Mill	Foreman
	Assistant Foreman

Electrical Division (CF)

General	Division Superintendent
	Assistant Division Superintendent
Electrical Shop—Motor and Control Division	Shop Foreman
Maintenance—Wiring Repairs and Construction	Wire Foreman
	Assistant Wire Foreman
Engineering, Drafting, Power, etc.	General Foreman
	Assistant Power Foreman
Crane Repair	Crane Foreman
Mechanical Shop Repair	Mechanical Foreman
Night Maintenance	Night Foreman
Mill Drives and Maintenance	Electrical Foreman
	Assistant Electrical Foreman

Fabricated Steel Construction Department

General	Division Superintendent
	Assistant Division Superintendent
	General Shop Foreman

[fol. 19]

Receiving and Shipping	Shipping Foreman
Shop	Shop Foreman
Maintenance	Electrical Foreman

Building and Highway Specialty Division (GA)

General	Division Superintendent
	Assistant Division Superintendent
	Assistant Engineer
Bar Department	General Foreman
	Turn Foreman
Joist Department	General Foreman
	Turn Foremen
Specialty Department	General Foreman
	Assistant General Foremen
	Turn Foremen
	Foremen
Column Form Department	General Foreman
Mechanical Department	General Foreman
	Turn Foremen

Metallurgical and Inspection Division (DF)

	Engineer of Tests
	Assistant Engineer of Tests
Chemical Laboratories	Chief Chemist
	Assistant Chief Chemist
	General Foreman
	Foremen Chemists

[fol. 20]

Chemical Laboratories (Cont.)	Chief Chemist (Coke Oven Laboratory)
	Assistant Chief Chemist
	Spectographer
	Assistant Spectographer
Mill Inspection Department	Chief Inspector
	Assistant Chief Inspector
Physical Testing Laboratory	Foreman
	Test Foreman
Bar Mills	Foreman Inspector
	Assistant Foremen Inspectors
Billet Yard	Foreman Inspector
Structural Shipping Yards	Foremen Inspectors
Specialty Shop	Spark Test Foreman
	Foreman Inspectors
Metallurgical Department	Chief Metallurgist
	Process Metallurgist
	Observation Foremen
Strip and Sheet Mills Hot Mill	Metallurgist
	Assistant Metallurgist
	Chief Inspector
	Turn Foremen Inspectors
Cold Mill	Assistant Metallurgist
	Chief Inspector

Order Division (AH)

	Division Superintendent
	Assistant Division Superintendent
	Assistant to Superintendent

[fol. 21]

	Chief Clerks
	Chief Steel Distributor
	Chief Mill Provider
	Chief Shipper
	Chief Biller

In Supreme Court of New York, County of Erie

[Same title]

Order to Show Cause for Enforcement of Subpoenas and Subpoena Duces Tecum

Upon the annexed petition of the New York State Labor Relations Board, duly verified the 31st day of January, 1945, by the Rev. William J. Kelley, O.M.I., Chairman thereof, the subpoenas and subpoena duces tecum, duly issued and served by the Board on the 15th day of November, 1944, and the affidavit of service thereof by Anne M. Hanrahan, duly sworn to on the 17th day of November, 1944.

Let, the Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt show cause before this Court at a Special Term, Part I thereof, appointed to be held in and for the County of Erie at the County Courthouse, located on Franklin Street in the City of Buffalo, New York, on the 16th day of February, 1945, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an Order should not be made and entered by this Court in accordance [fol. 22] with the provisions of Section 708, subdivision 3, of the New York State Labor Relations Act, requiring the respondent, Bethlehem Steel Company, to produce the documents and evidence as required by the said subpoena duces tecum duly served upon it on the 15th day of November, 1944, and why the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, should not appear and attend before a trial examiner designated by the New York State Labor Relations Board, testify and give evidence pursuant to subpoenas duly served upon them on the 15th day of November, 1944, in a proceeding pending before the New York State Labor Relations Board entitled "In the Matter of Bethlehem Steel Company and Foreman's Association of America, Bethlehem Steel Chapter No. 50", and requiring the respondents to comply in all respects with the said subpoenas and subpoena duces tecum, and for such other, further, and different relief as to this Court may seem just and proper.

Sufficient reason appearing therefor, let service of a copy of this Order to Show Cause, together with the petition on which it is granted, on the respondents, Bethlehem Steel

Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, on or before the 8th day of February, 1945, be good and sufficient service.

Dated: Buffalo, N. Y., February 7th, 1945.

Parton Swift, Justice of the Supreme Court of the State of New York.

[fol. 23] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Same title]

PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM, READ IN SUPPORT OF APPLICATION

To the Supreme Court of the State of New York, County of Erie:

The New York State Labor Relations Board (hereinafter referred to as the Board), by Rev. William J. Kelley, O.M.I., Chairman thereof, pursuant to the authority conferred upon it by an Act of the Legislature of the State of New York, known as the New York State Labor Relations Act, Article 20 of the Labor Law as amended (hereinafter referred to as the Act), respectfully petitions this Honorable Court for an Order in accordance with Section 708, subdivision 3, of the Act, directing respondents, Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear and attend before a trial examiner of the Board, and bring with them, and produce before said trial examiner the documents and evidence required by a certain subpoena duces tecum, and to testify and give evidence before said trial examiner as required by certain subpoenas, said subpoenas and subpoena duces tecum are hereto annexed and marked "Exhibits A and B", being duly issued and served by the Board upon the respondents in a proceeding pending before the Board entitled "In the Matter of Bethlehem Steel Company—and—Foreman's Association of [fol. 24] America, Bethlehem Steel Chapter No. 50", the

same being Case No. WE-379 upon the records of the Board.

In support of its petition, the Board respectfully shows:

The Respondents

1. The respondent, Bethlehem Steel Company, is a corporation organized under the laws of the State of Pennsylvania, and licensed to do business in New York State. The instant case involves only the company's division at Lackawanna and Buffalo, New York, commonly and herein referred to as the Lackawanna Plant.

2. The respondent, Edward F. Entwisle, is employed by the Bethlehem Steel Company at the said Lackawanna Plant as its General Manager; Chauncey L. Baker as head of the Industrial Relations Department; William H. Peters, Jr., as Works Accountant; and J. Driscoll Dewitt as Supervisor of the Employment Department.

The Proceeding Pending Before the Board

3. A proceeding for investigation and certification of collective bargaining representative of certain employees of the respondents, under Section 705 of the Act, is pending before the Board. The proceeding was initiated by a petition filed with the Board on the 24th day of August, 1944, by the Foreman's Association of America, Bethlehem Steel Chapter No. 50. An amended petition was filed with the Board by said union on the 20th day of October, 1944.

4. The union's amended petition alleges that certain employees of the respondents constitute a unit appropriate [fol. 25] for the purposes of collective bargaining; that it represents the employees in the alleged unit; and that the respondents have refused to recognize and bargain with the union as the collective bargaining representative of the said employees.

5. The unit, which the union alleged is appropriate for the purposes of collective bargaining, consists of all the foremen, general foremen, and supervisors, exclusive of superintendents, employed by the Bethlehem Steel Company at the said Lackawanna Plant.

6. On the 23rd day of October, 1944, the Board duly issued and served its notice of hearing, scheduling a hearing

to be held on the 1st day of November, 1944, at the State Office Building, Buffalo, New York. Said hearing was subsequently adjourned, at the request of respondent, Bethlehem Steel Company, to the 9th day of November, 1944.

7. Pursuant to said notice, hearings were held on the 9th, 10th, 11th, 24th and 25th days of November, 1944, at the State Office Building, Buffalo, New York, before I. L. Broadwin, Esq., a trial examiner duly designated by the Board. On the 25th day of November, 1944, the said trial examiner adjourned the hearing sine die.

8. The Board, under Section 705 of the Act, must determine in each case whether the unit, which the petitioning union seeks to represent, or some other unit, is appropriate for the purposes of collective bargaining, and the eligibility of the employees to vote in any election the Board may conduct.

[fol. 26] The Subpoenas Disobeyed

9. In order to determine whether the unit requested, or some other unit, is appropriate for the purpose of collective bargaining the Board, pursuant to its power under Section 708 of the Act, issued subpoenas and a subpoena duces tecum to the respondents on the 15th day of November, 1944, the originals thereof are annexed hereto, made a part hereof, and marked "Exhibits A and B." The subpoena duces tecum, duly served on the Bethlehem Steel Company, by the General Manager of the said Lackawanna Plant, called for all payroll register sheets, weekly summary sheets for hourly-rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper, and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses, and all other compensation paid to all categories of employees at the said Lackawanna Plant during the month of October, 1944, which records would show the different wage levels and the number of employees and classifications of said employees which may be included within, or excluded from, the appropriate bargaining unit. The subpoenas, duly served on the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, required them to

appear and attend before the said trial examiner, testify and give evidence in the proceeding pending before the Board. These subpoenas and subpoena duces tecum were return-
[fol. 27] able before the said trial examiner on the 24th day of November, 1944.

10. The subpoenas and subpoena duces tecum were served upon the respondents by registered mail on the 15th day of November, 1944. The return receipts, which are annexed hereto, made a part hereof, and marked "Exhibits C and D", show that the subpoenas and subpoena duces tecum were delivered on the 17th day of November, 1944. Accompanying the duplicate subpoenas and subpoena duces tecum served upon each respondent were United States Post Office money orders, four for $2.10 and one for $2.60, as witness fees for one day's attendance and mileage. The original receipts for these money orders, issued by the United States Government at Columbus Circle Post Office Station, 10 West 60th Street, New York, New York, bearing numbers 75969, 75968, 75966, 75967 and 75965, are annexed hereto, made a part hereof, and marked "Exhibits E and F." Annexed hereto, made a part hereof, and marked "Exhibit G", is the affidavit of service of said subpoenas, subpoena duces tecum and fees made by Anne M. Hanrahan, duly sworn to on the 17th day of November, 1944. The Court's attention is respectfully referred to Section 708, subdivision 5, of the Act, which provides for service of Board process by registered mail, and provides further that the return receipt shall be proof of service. At the hearing before the said trial examiner, held on November 24, 1944, counsel for the respondents conceded on the record that these subpoenas and subpoena duces tecum were duly served and that the fees had been paid.

[fol. 28] 11. At the hearing before the said trial examiner, the respondent, Bethlehem Steel Company, failed and refused to produce certain payroll records, covering the employees at said Lackawanna Plant, called for by the subpoena duces tecum, and the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, despite subpoenas duly served upon them, failed and refused to testify and answer certain questions of the said trial examiner concerning the wages, salaries, bonuses and other compensation paid to the em-

ployees of respondent, Bethlehem Steel Company. Accordingly, the Board's investigation could not continue and the said trial examiner adjourned the hearing sine die.

12. The proceeding is now pending and undetermined before the Board.

Materiality and Relevancy of the Evidence Sought by the Board

13. The general nature of the information sought by the Board concerns the wages, salaries, bonuses and other compensation paid to the employees of the respondent, Bethlehem Steel Company.

14. In order to secure the above information, the Board must have access to, and examine, the payroll records, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memorandum which separately and/or together reflect the weekly, bi-[fol. 29] weekly and monthly wages, salaries, bonuses and other compensation of said employees.

15. Section 708, subdivision 1, of the Act expressly provides that the Board may require this information. It reads:

> "The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses and receive evidence."

16. The information sought by the Board is material and necessary in order that the Board may perform its statutory

duty (the Act, Section 705, subdivision 2) of determining whether the unit sought by the union, or some other unit, is appropriate for the purposes of collective bargaining. This determination depends in each case upon many factors, such as: the similarity or diversity of the wages, hours and working conditions of the employees; the nature of their work; the extent of their responsibility; the amount of contact among the various groups of employees; the ex-
[fol. 30] tent and character that self-organization already has taken among the employees; and others.

17. The information sought by the Board is essential because it may reflect the extent and degree of supervisory authority exercised by the various employees. For example, the amount of compensation may indicate that an employee's supervision is of such a nature as to warrant his exclusion from a collective bargaining unit of lower paid supervisory employees. On the other hand, it may indicate a total lack of supervisory authority, in which case the employee may be excluded from a unit of supervisory employees.

18. The information sought by the Board is essential because it may reveal various wage levels among respondents' supervisory employees. Different wage levels among supervisory employees may indicate different levels of supervisory authority and, thus, be an important factor in influencing the Board to place these supervisory employees in different bargaining units rather than in a single unit.

19. In prior decisions, the Board has given weight to wages, salaries, bonuses and other compensation as a factor in determining the appropriate bargaining unit. For example:

Matter of John Morrell & Co., Inc., Decision No. 291, 2 S. L. R. B. 17;

Matter of 90 Riverside Drive, et al., Decision No. 100, 1 S. L. R. B. 336;

Matter of Daniel Reeves, Inc., Decision No. 134, 1 S. L. R. B. 359;

[fol. 31] *Matter of New York Trap Rock Corp.*, Decision No. 157, 1 S.L.R.B. 440;

Matter of Wallach's Hairdressing Salon, Inc., Decision No. 319, 2 S.L.R.B. 34;

Matter of H. L. Green Co., Inc., Decision No. 653, 2 S.L.R.B. 573;
Matter of Singer Sewing Machine Company, Decision No. 512, 2 S.L.R.B. 512;
Matter of Robbins Reef Motor Co., Inc., Decision No. 495, 2 S.L.R.B. 229;
Matter of Horn and Hardart Co., Decision No. 2335, 6 S.L.R.B. 21;
Matter of Charles Frelhofer Baking Co., Decision No. 2498, 6 S.L.R.B. 395.

20. Further, when the Board conducts an election, it needs the payroll records to make sure that those who seek to vote are within the eligible group and to establish the identity of persons seeking to vote.

This Application

21. This application is brought pursuant to Section 708, subdivision 3, of the Act, which provides as follows:

> "In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction f which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony [fol. 32] touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

22. The reason why an Order to Show Cause is requested is that an investigation is pending and undetermined before the Board in connection with which the testimony of the persons subpoenaed and the documents required by the subpoena duces tecum are necessary, and a delay in the hearing and determination of this application would prejudice the rights of the parties to the proceeding pending before the Board and impede the Board in discharging its statutory duties.

23. No previous application for the relief herein sought has been made.

Wherefore, the New York State Labor Relations Board respectfully prays this Honorable Court for an Order requiring and directing the said respondent, Bethlehem Steel Company, to produce the documents and evidence required by the subpoena duces tecum duly served upon it, and the respondents, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear and attend before a trial examiner designated by the New York State Labor Relations Board, testify and give evidence pursuant to subpoenas duly served upon them in an investigation pending before the Board entitled "In the Matter of Bethlehem Steel Company-and-Foreman's Association of America, Bethlehem Steel Chapter No. 50," and [fol. 33] for such other, further and different relief as to this Court may seem just and proper.

Dated: New York, N. Y., January 31, 1945.

Rev. William J. Kelley, O.M.I., Chairman.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Rev. William J. Kelley, O.M.I., being duly sworn, deposes and says: That he is Chairman of the New York State Labor Relations Board, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

Rev. William J. Kelley, O.M.I.

Sworn to before me this 31st day of January, 1945.
(Signed) William J. Peterson, Notary Public,
Queens Co. No. 1627.

[fol. 34] EXHIBIT A TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM.

Subpoena Duces Tecum

The People of the State of New York to Bethlehem Steel Co., by Edward F. Entwistle, General Manager, 1915 Hamburg Turnpike, Hamburg, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the forenoon, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America; Bethlehem Steel Chapter No. 50, Case No. WE-379

and that you bring with you and produce at said time and place, or at any adjourned date thereof, the following:

All payroll register sheets, weekly summary sheets for hourly rate employees, semi-monthly sheets for salaried employees, rate record cards, time cards, card of accounts form sheet, payrolls proper and any and all other records, books and memoranda which separately and/or together reflect the weekly, bi-weekly and monthly wages, salaries, bonuses and all other compensation paid to the categories [fol. 35] of employees contained in Schedule A annexed hereto, during the month of October, 1944; or in the alternative a verified statement setting forth each of the said categories of employees in said Schedule A and their respective weekly, bi-weekly or monthly wages, salaries, bonuses and all other compensation paid to said categories during the month of October, 1944, now in your custody, and all other deeds, evidences and writings which you have in your custody concerning the premises.

And for a Failure to Attend, or to produce the deeds, evidence and writings aforesaid, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law.

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New

York, New York, the 15 day of November, one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

SCHEDULE A

Schedule A annexed to the subpoena duces tecum addressed to Bethlehem Steel Co. is the same as Schedule A printed herein above at Folios 21 to 61, except that at the end of the list of positions in each Division named in Schedule A there appeared the following words: "Skilled, semi-skilled and unskilled labor employed in this division."

[fol. 36] EXHIBIT B TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Subpoena

The People of the State of New York to "John" Baker, the first name John being fictitious, the person intended is in charge of the personnel department and is known as "management's representative," % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3,

Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board.

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 37] Subpoena

The People of the State of New York to William H. Peters, Jr. (Works Accountant) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon; or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steek Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 38] Subpoena

The People of the State of New York to Richard (Dick) De Witt (Head of Employment Department) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 39] Subpoena

The People of the State of New York to Edward F. Entwistle (General Manager) % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y., Greeting:

We Command You, that all business and excuses being laid aside, you and each of you appear and attend before a Trial Examiner of the New York State Labor Relations Board at Hearing Room Part 4, State Office Building, in the City of Buffalo, N. Y. on the 24th day of November, 1944 at 10:00 o'clock in the fore noon, or at any adjourned date thereof, to testify and give evidence in a certain proceeding

now pending before the New York State Labor Relations Board in the matter of

Bethlehem Steel Co.—and—Foreman's Association of America, Bethlehem Steel Chapter No. 50, Case No. WE-379

And for a Failure to Attend, you will be subject to the proceedings and penalties provided in Section 708, Par. 3, Article 20 of the Labor Law, and the Rules and Regulations of the New York State Labor Relations Board

Witness, Honorable H. Myron Lewis one of the Members of the New York State Labor Relations Board at New York, New York, the 15 day of November one thousand nine hundred and forty-four.

(S.) H. Myron Lewis, Member of the New York State Labor Relations Board.

[fol. 40] EXHIBIT C TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. Gen Mgr:
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

EXHIBIT D TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth. Steel Co. Gen Mgr.
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co.—Wm Peters
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 11-17-44, 194

U. S. Government Printing Office 16-12421

[fol. 41] Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. De Witt Emply
(Signature or name of addressee)

S/2 F. M. Rockwood
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 11-17-44, 194

Return Receipt

Form 3811
Rev. 1-4-40

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

S/1 Beth Steel Co. "John" Barker
(Signature or name of addressee)

S/2 F. M. Lockwood
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 11-17-44, 194

[fol. 42] EXHIBITS E, F AND G TO PETITION FOR ENFORCEMENT OF SUBPOENAS AND SUBPOENA DUCES TECUM

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Anne M. Hanrahan, being duly sworn, deposes and says:

That she is a typist in the office of the New York State Labor Relations Board, 250 West 57 St., Borough of Manhattan, City, County and State of New York;

That she is over the age of twenty-one (21) years and not a party to this proceeding:

That on the 15th day of November, 1944, she served duplicate originals of the attached subpoenas and subpoena duces tecum by registered mail upon the following:

A subpoena to William H. Peters, Jr. (Works Accountant), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to Edward F. Entwistle (Central Manager), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to Richard (Dick) De Witt (Head of Employment Department), % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena to "John" Baker, the first name John being fictitious, the person intended is in charge of the personnel department and is known as "management's representative," % Bethlehem Steel Co., 1915 Hamburg Turnpike, Lackawanna, N. Y.

A subpoena duces tecum to Bethlehem Steel Co., by Edward F. Entwistle, General Manager, 1915, Hamburg Turnpike, Lackawanna, N. Y.

[fol. 43] by depositing the same security enclosed in postpaid wrapper in a branch post office regularly maintained by the United States Government at Columbus Circle Station, West 60th Street, New York, N. Y., directed to said persons and corporation listed above at said address, that being the place where the said William H. Peters, Jr., Edward F. Entwistle, Richard (Dick) DeWitt, "John" Baker, and Bethlehem Steel Co., have their place of business, between which places there then was and now is a regular communi-

cation by mail; and at the same time placing a United States Post Office money order in the same said post-paid wrapper as follows:

Money Order No. 75969, to William H. Peters, Jr., for $2.10

Money Order No. 75968, to Edward F. Entwistle, for $2.10

Money Order No. 75966, to Richard (Dick) DeWitt, for $2.10

Money Order No. 75967, to "John" Baker for $2.10

Money Order No. 75965, to Bethlehem Steel Co., for $2.60

as and for the lawful fees of such witnesses and corporation to which they, as aforesaid, were entitled for mileage for traveling from 1915 Hamburg Turnpike, Lackawanna, N. Y., to the place where such witnesses and corporation, as aforesaid, are required to attend, which is at a distance of not over twenty (20) miles, and for one day's attendance of such witnesses and corporation;

That the United States Government Post Office registered [fol. 44] mail return receipts for the aforesaid registered mail post-paid wrappers, together with the United States Government Post Office receipts for the aforesaid money orders, payable to the persons and corporation as listed above are attached hereto and made a part hereof;

Deponent knew the persons served, as aforesaid, to be the same persons mentioned and described in said subpoenas as such witnesses and knew the said corporation served as aforesaid to be the corporation mentioned and described in said subpoena duces tecum and knew said Edward F. Entwistle to be such officer thereof.

(Signed) Anne M. Hanrahan.

Sworn to before me this 17th day of November, 1944.
(Signed) William J. Peterson, Notary Public, Queens Co. No. 1627.

[fol. 45] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Same title]

AFFIDAVIT OF EDWARD F. ENTWISLE, READ IN OPPOSITION TO APPLICATION

STATE OF NEW YORK,
County of Erie, ss.:

Edward F. Entwisle, being duly sworn, deposes and says:

I am one of the individual respondents in the above-entitled action and I am the General Manager of the Lackawanna Plant (hereinafter called the Lackawanna Plant) of Bethlehem Steel Company (hereinafter called the Company), the corporate respondent in the above-entitled action.

This affidavit is made by me in opposition to the application of the New York State Labor Relations Board (hereinafter sometimes called the State Board) for an order directing the Company to comply with a subpoena duces tecum and the individual defendants to comply with subpoenas, all dated November 15, 1944, and returnable on November 24, 1944, before a Trial Examiner of the State Board in a proceeding pending before such Board entitled "Bethlehem Steel Company and Foreman's Association of America, Bethlehem Chapter No. 50, Case No. WE-379" (which proceeding is hereinafter called the State Board proceeding). A copy of the subpoena duces tecum which was served on the Company is annexed as Exhibit A to the petition of the State Board in the above-entitled action, and copies of the subpoenas served on the individual respond-
[fol. 46] ents are annexed as Exhibit B to such petition.

The State Board proceeding is an investigation by such Board of an alleged controversy concerning the representation for the purposes of collective bargaining of certain supervisory personnel at the Lackawanna Plant. Such proceedings arose out of an amended petition filed with the State Board by Foreman's Association of America, Bethlehem Chapter No. 50 (hereinafter called the Foreman's Association) for certification as the representative of employees in a bargaining unit consisting of foremen, general foremen and supervisors, exclusive of superintendents, in the employ of the Company at the Lackawanna Plant. A copy of such amended petition and of the notice

of hearing thereon issued by the State Board under date of October 23, 1944, is annexed hereto as Exhibit A. Such amended petition is hereinafter sometimes called the petition of the Foreman's Association.

The Company is a Pennsylvania corporation, licensed to do business in the State of New York. It is engaged, among other things, in the production and sale of steel and steel products. It owns and operates plants engaged in the production of steel and steel products in the States of New York (including the Lackawanna Plant), Pennsylvania, Maryland, California and Washington. The Lackawanna Plant, which is the only plant involved in the State Board proceeding, is located in and near Buffalo and Lackawanna, New York, on several tracts of land having an aggregate area of approximately 1,200 acres. The Company employs approximately 11,100 employees at the Lackawanna Plant, of whom approximately 650 are in- [fol. 47] cluded in the supervisory classifications for which the Foreman's Association seeks by its petition in the State Board proceeding to be certified as the exclusive collective bargaining representative.

The Company is engaged at the Lackawanna Plant in the manufacture of steel and steel products, including structural sections, sheet piling, cold rolled sheets and strip, hot rolled sheets and strip, sheared plates, rails, splice bars, tie plates, bars, billets, blooms and slabs. The principal raw materials used at the Lackawanna Plant are coal, coke, iron ore, scrap, oil, limestone and refractories. Most of such raw materials are delivered to the Lackawanna Plant by lake vessels which are discharged at docks which are located on the premises of, and are a part of, the Lackawanna Plant.

During the calendar year 1943 the aggregate value of all materials used by the Company at the Lackawanna Plant was in excess of $65,000,000, of which more than 90% was delivered to said plant from points outside the State of New York. During 1943 the Company manufactured at the Lackawanna Plant finished products valued in excess of $122,000,000, of which more than 80% was shipped from said plant to points outside the State of New York.

The duties of the supervisory personnel at the Lackawanna Plant, including the supervisory personnel comprising the alleged bargaining unit as set forth in the petition of the Foreman's Association, include, in general: the

supervising and directing of the work of employees at the Lackawanna Plant and the instructing of such employees as to the manner of performing their work; the enforcement among such employees of rules and regulations of [fol. 48] the Company; the making of recommendations with regard to the hiring, discharging, promotion, transfer, lay-off and recalling to work of such employees; the disciplining of such employees; the assignment of employees to work; and the representation of the Company in the handling of grievances which are presented to it by such employees. In the performance of such duties such supervisory personnel are required to act on behalf of and in the interest of the Company in its relations with the employees whom they supervise.

Hearings in the State Board proceeding were held at Buffalo, New York, on November 9, 10, 11, 24 and 25, 1944, before I. L. Broadwin, a Trial Examiner designated for that purpose by the State Board. At such hearings the Company appeared specially by its attorneys, Cravath, Swaine & Moore, and objected to the jurisdiction of the State Board and moved that the petition of the Foreman's Association be dismissed.

The Company refused to produce the documents and evidence called for by the above-mentioned subpoena duces tecum, upon the grounds that the State Board does not have jurisdiction of the subject matter of the State Board proceeding and that the documents and evidence called for by such subpoena duces tecum were not relevant or material to any issue in such proceeding.

The documents and evidence sought by the State Board include information as to the wages, salaries and earnings paid to all classifications of employees in twelve divisions of the Lakawanna Plant. Such documents and evidence would include information as to the compensation of approximately 10,000 employees at the Lackawanna Plant, [fol. 49] of whom only approximately 650 are included in the alleged appropriate unit described in the petition of the Foreman's Association. Such information is not public information. It is highly confidential and a disclosure of it, especially the disclosure to competitors of the Company in the steel industry, would result in irreparable injury to the business of the Company and seriously impair its competitive position in such industry. The disclosure of such information to competitors of the Company would

not only enable them to determine the amounts being paid by the Company to individual supervisory employees at the Lackawanna Plant, but it also would enable such competitors to calculate with a reasonable degree of accuracy the labor costs of the Company at its Lackawanna Plant.

The Trial Examiner at the hearing before him stated the purpose for which such information was sought as follows (Stenographic Minutes of Hearing, pages 124 to 125):

> "Now, I have been looking over Board's Exhibit 6 and I find we will simply have to have testimony on the records as to salaries. * * * That is one of the elements that are to be considered, and a very important element, in arriving at a decision as to whether or not a particular job, a man holding a particular job, by comparison, someone is actually a supervisory employee, exercising supervision of such a nature as to identify him with management, to such an extent as to warrant exclusion from a collective bargaining unit of supervisory employees. * * *"

The State Board in its petition in the above-entitled action alleges that the information sought by it is necessary [fol. 50] because "the amount of compensation may indicate that an employee's supervision is of such a nature as to warrant his exclusion from a collective bargaining unit of lower paid supervisory employees." In my opinion, however, the amount of compensation which is paid by the Company to an employee does not give any indication as to whether or not the duties of that employee are supervisory in nature or the extent of his duties which are supervisory in nature. The amount of compensation which is paid by the Company to a particular employee is determined by a great variety of factors, among which are, the special technical or professional knowledge and skill which is required of him, his experience and length of service with the Company, his ability to perform any duties which may be required of him, the general level of compensation being paid for comparable work in other plants and by other employers, and the general conditions of supply of and demand for persons having comparable knowledge, skill and experience. In respect of supervisory personnel, in particular, the individual personality, trustworthiness and general character of the particular employee, and especially his qualities of leadership, initiative, alertness and loyalty,

are important factors in determining the amount of compensation which is paid to him.

In an industrial operation such as a steel plant there are frequently individual employees whose duties require a high degree of skill and technical knowledge and experience and who exercise no supervisory duties whatsoever but who receive substantially greater compensation than other employees who exercise supervisory duties over a large number of men. There are also many employees whose duties [fol. 51] include supervisory duties but who also must have a high degree of skill and technical knowledge and experience and who because of the technical nature of their work receive substantially greater compensation than other supervisory employees who have supervision over a much larger number of employees. Accordingly, the amount of compensation which is paid to any particular employee or any particular class of employees does not furnish any reliable indication as to whether or not the work of such employees is supervisory in nature or of the extent to which such employees act for and in the interest of the Company in its relations with others of its employees.

Pursuant to the subpoena served on me by the State Board, I appeared and testified at the hearing before the Trial Examiner on November 24, 1944. At such hearing I answered all questions asked of me, except certain questions concerning the compensation paid to division superintendents at the Lackawanna Plant and to three general foremen and a master mechanic and chief electrician at such Plant. Such questions are set forth in the following extracts from the stenographic minutes of the hearing before the Trial Examiner on November 24, 1944 (pages 470 and 471), the questions being questions asked of me by the Trial Examiner and the answers being my answers to such questions:

> "Q. Do the salaries of these general foremen, whose powers and functions are almost identical with those of superintendents—are they the same salaries? Do you know?
>
> "A I know, but I don't care to state what they are.

"Q. Now, let me ask you this, who fixes the salaries [fol. 52] of heads of the departments who constitute your staff, the twenty-one?

"A. They are fixed largely by myself and approved in Bethlehem.

"Q. Well, you say 'largely'. Are there exceptions to that rule or practice?

"A. No. Maybe I'd better correct it and say in every case they are fixed by myself and approved in Bethlehem.

"Q. They are, however, subject to approval at the main office?"

"A. That's right.

"Q. And you know the salaries of these men?

"A. Yes.

"Q. Do you also know the salaries of their assistants, the assistant superintendents?

"A. Yes.

"Q. And your position with respect to answering any inquiry regarding their salaries is the same as it is with respect to the other people?

"A. That's correct.

"Q. You decline to give any information with reference to their salaries?

"A. That's correct."

The employees to whom the Trial Examiner referred in the first question above quoted as "general foremen" were the following employees of the Company at its Lackawanna Plant: the general foreman of the General Billet Yard, the general foreman of the Splice Bar and Tie Plate Department (Rolling Mills Division), the general foreman of [fol. 53] Brickmasons (Mechanical Division) and the Master Mechanic and Chief Electrician of the Strip Mill Division. At the hearing before the Trial Examiner the Foreman's Association agreed (Stenographic Minutes of Hearing, pages 628 to 630) that the general foreman of Brickmasons should not be included in the unit which it alleged to be the appropriate bargaining unit. The twenty-one superintendents or heads of departments who are referred to by the Trial Examiner in his above-quoted questions were in charge of the major divisions of the operations at the Lackawanna Plant and the petition of the Foreman's Association expressly excludes them from such alleged

bargaining unit (See Exhibit A annexed hereto). The authority and responsibilities of the other employees who are referred to in the above-quoted questions are substantially similar to the authority and responsibilities of the general foreman of Bricklayers.

The information with regard to the salaries of such supervisory personnel which was called for by the above-quoted questions is highly confidential and I believe that the disclosure of such information, especially its disclosure to competitors of the Company, would cause irreparable harm to it in its business. Furthermore, I believe that none of such information is necessary or would be useful for the purpose of determining whether or not the unit alleged by the Foreman's Association in its petition to be an appropriate unit for the purposes of collective bargaining with the Company is in fact such an appropriate unit.

At the hearing before the Trial Examiner I testified at length with regard to the supervisory organization at the [fol. 54] Lackawanna Plant and the duties, responsibilities and authority of the members of such organization. I did not refuse to answer any questions in that regard. The stenographic transcript of my testimony at such hearing covers over 65 pages. At such hearing, John E. Jacobs, Assistant to the General Manager at the Lackawanna Plant, also testified at length regarding the duties, responsibilities and authority of the various members of supervisory personnel at the Lackawanna Plant. His testimony covers approximately 230 pages of the stenographic minutes of such hearing. A number of other witnesses, some of whom appeared on behalf of the Foreman's Association, also testified at such hearing with regard to such matters. I believe, therefore, that the evidence which was presented to the Trial Examiner at such hearing includes direct testimony with regard to the duties, responsibilities and authority of the supervisory personnel at the Lackawanna Plant which is much more accurate and reliable than any inferences which could be drawn from evidence as to the amounts of salaries, wages or earnings of such supervisory personnel. For reasons which are hereinbefore set forth, I believe that further information with regard to the compensation which is paid to such supervisory personnel or to other employees at the Lackawanna Plant is not necessary and would not be useful for the

purpose of determining the relative scope and importance of the supervisory duties of such personnel.

Edward F. Entwisle.

Sworn to before me this 15th day of February, 1945.
Pauline H. Winkler, Notary Public, Erie Co., N. Y.

[fol. 55] EXHIBIT A

STATE OF NEW YORK, BEFORE THE NEW YORK STATE LABOR RELATIONS BOARD

Case No. WE-379

In the Matter of BETHLEHEM STEEL CO., Employer, and FOREMAN'S ASSOCIATION OF AMERICA BETHLEHEM STEEL CHAPTER NO. 50, Petitioner

AMENDED

PETITION BY EMPLOYEES FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 705 OF THE NEW YORK STATE LABOR RELATIONS ACT

Name and address of employer: Bethlehem Steel Company, 1915 Hamburg Turnpike, Lackawanna, N. Y.

General nature of business: Steel Manufacturing

Approximate percentage of sales, if any, made to points outside New York State: 85%

Other facts concerning interstate business, if any: None

Approximate total number of employees: 15,000

The types, classifications or groups of employees which the petitioner claims constitute the appropriate bargaining unit or units: Foreman, general foreman, supervisors, exclusive of superintendents

Number of employees within such unit or units: Approximately 500

[fol. 56] Names and addresses of any other known individuals or labor organizations who claim or may claim to represent any of the employees in such bargaining unit: None

Does the petitioner request certification as the collective bargaining representative of the employees within the bargaining unit or units claimed to be appropriate?

The undersigned hereby alleges that a question or controversy has arisen concerning the representation of the employees in the above bargaining unit, in that:

The petitioner has notified the employer, that it represents a majority of the employees in the above stated classification but the employer states that the aforesaid classification does not constitute the appropriate bargaining unit, and thus the employer seeks a certification of the petition by the New York Labor Relations Board before it will recognize the petitioner as the bargaining representatives of the employees outlined in said petition.

The undersigned requests that pursuant to section 705 of the New York State Labor Relations Act, the New York State Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name of employees or representatives filing this petition. (If a labor organization, give also name and official position of person acting for the organization.)

Foreman's Association of America Bethlehem Steel Chapter No. 50

Donald J. McNaughton, Pres. Chap. No. 50 FAA.

Address, 98 Bloomfield Avenue. Telephone No., Tr-0694.

[fol. 57] STATE OF NEW YORK

CITY OF BUFFALO,
County of Erie, ss:

On this 20 day of October, 1944 before me personally appeared Donald J. McNaughton to me known to be the person described in, and who executed this petition, who having been duly sworn (or affirmed) before me, stated that to the best of his information and belief, all statements contained therein, both in writing and in print, are true.

Regina J. Reidy, Notary, March, 1946.

STATE OF NEW YORK

BEFORE THE STATE LABOR RELATIONS BOARD

Case No. WE-379

In the Matter of BETHLEHEM STEEL CO., Employer, and FOREMAN'S ASSOCIATION OF AMERICA BETHLEHEM STEEL CHAPTER NO. 50

NOTICE OF HEARING

There has heretofore been filed a petition with the New York State Labor Relations Board by Foreman's Association of America, Bethlehem Steel Chapter No. 50, alleging that a question or controversy has arisen concerning the representation of certain employees of Bethlehem Steel Co. and requesting that, pursuant to authority granted in [fol. 58] Section 705, subdivision 3, of the New York State Labor Relations Act, the New York State Labor Relations Board investigate such question or controversy and certify the name or names of the representatives that have been designated or selected by said employees. Copy of said petition is attached hereto. It appearing to the New York State Labor Relations Board that a question or controversy has arisen concerning the representation of the employees of Bethlehem Steel Co.,

You Are Hereby Notified, that, pursuant to Section 706 subdivision 3, of the said Act, on the 1st day of November, 1944, at 10:00 o'clock in the forenoon, in Hearing Room Part 4; State Office Building, Buffalo, N. Y., a hearing will be conducted before the New York State Labor Relations Board upon the question or controversy concerning representation, at which time and place you shall have the right to appear, in person or otherwise, and to give testimony.

In Witness Whereof, the New York State Labor Relations Board has caused this, its Notice of Hearing, to be signed by its Executive Secretary.

A. M. Goldberg, Executive Secretary.

Dated: New York, N. Y., October 23, 1944.

To:

Bethlehem Steel Co. (R)
1915 Hamburg Turnpike
Lackawanna, N. Y.

Cravath, de Gersdorff, Swaine & Wood, Esqs.
15 Broad Street New York 5, N. Y.

Chester A. McLain, Esq.
c/o Cravath, de Gersdorff, Swaine & Wood, Esqs. 15 Broad Street New York 5, N. Y.

Foreman's Association of America (R)
Bethlehem Steel Chapter No. 50
98 Bloomfield Avenue Buffalo 20, N. Y.

Foreman's Association of America (R)
Attention: Robert H. Keys, Pres.
515 Barlum Tower Detroit 26, Mich.

[fol. 59] In Supreme Court of New York County of Erie

[Same Title]

Affidavit of Chester A. McLain, Read in Opposition to Application

State of New York,
County of New York, ss.:

Chester A. McLain, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Cravath, Swaine & Moore, attorneys for the respondents in the above-entitled action.

This affidavit is made by me in opposition to the application of the New York State Labor Relations Board (hereinafter sometimes called the State Board) for an order directing Bethlehem Steel Company (hereinafter called the Company) to comply with a subpoena duces tecum and directing the individual respondents to comply with subpoenas, all of which subpoenas were dated November 15, 1944, and were returnable on November 24, 1944, before a Trial Examiner of the State Board in a proceeding pending before such Board entitled "Bethlehem Steel Company and Foreman's Association of America, Bethlehem Chapter No. 50, Case No. WE-379" (which proceeding is hereinafter called the State Board proceeding).

The State Board proceeding, in connection with which the above-mentioned subpoenas were issued, is a proceeding brought by the State Board under Section 705 of the

New York State Labor Relations Act (Laws of 1937, Chapter 443, as amended by Laws of 1942, Chapter 518, [fol. 60] hereinafter sometimes called the State Act) for the investigation and certification of representatives for the purposes of collective bargaining of certain supervisory personnel at the Lackawanna Plant of the Company. Such proceeding arose out of a petition filed with the State Board by Foreman's Association of America, Bethlehem Chapter 50 (hereinafter called the Foreman's Association), for certification as the exclusive bargaining representative of employees in an alleged appropriate unit consisting of foremen, general foremen and supervisors, exclusive of superintendents, at the Lackawanna Plant.

The copy of the Constitution of the Foreman's Association which was introduced in evidence in the State Board proceeding as Board's Exhibit 14 contains the following provisions, among others:

"Article I—Name

"This voluntary association of supervisory employees shall be known as Foreman's Association of America.

"Article II—Purposes

"The purposes of the Association shall be to encourage social acquaintances among supervisory employees, to confer and act upon measures for the protection and advancement of the economic welfare of supervisory employees through collective bargaining, and to encourage study, conference, and wider learning among supervisory employees to the end that they may improve in the supervision of men and women in industry.

* * * * * * *

"Article V—Membership

* * * * * * *

"Section 2. Any employee of good moral character, [fol. 61] whose duties require the supervision of other employees, or who directs work, who may or may not supervise other employees, and who is not a member of any other organization recognized by his employer

as representing him in collective bargaining, may become a member of the Association after having been employed as a supervisory employee for a period of not less than thirty (30) days prior to the filing of application for membership, and provided that such application to a Chapter of the Association is accompanied by a membership fee.

"Section 3. No supervisory employee or individual acting as negotiator in formulating employer-policy may become a member of the Foreman's Association of America."

Hearings were held in such proceeding before a Trial Examiner of the State Board on November 9, 10, 11, 24 and 25, 1944. I appeared specially at such hearings on behalf of Bethlehem Steel Company and objected to the jurisdiction of the State Board in such proceeding and moved that the petition therein of the Foreman's Association be dismissed on the following grounds:

"* * * First, that the classifications of employees claimed by the petitioner in that petition to constitute the appropriate bargaining unit or units are subject to the provisions of the National Labor Relations Act and the jurisdiction of the National Labor Relations Board under that Act; and that such classifications of employees are not, therefore, subject to the provisions of the New York State Labor Relations Act or to the jurisdiction of the New York State Labor Relations Board under that Act.

"Secondly, that Bethlehem Steel Company, the employer named in that petition, in its steel manufacturing operations which are referred to in that petition, [fol. 62] is an employer within the meaning and subject to the provisions of the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board under that Act; and said company is not, therefore, an employer within the meaning of and subject to the provisions of the New York State Labor Relations Act or the jurisdiction of the New York State Labor Relations Board under that Act.

"And, thirdly, that the question or controversy which is alleged in the petition in this case is a question or controversy affecting commerce within the meaning of the term 'affecting commerce' as that term is defined

in the National Labor Relations Act and, therefore, that such question or controversy, if it exists, is within the jurisdiction of the National Labor Relations Board under that Act and not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

"And, fourthly, that if the New York State Labor Relations Act should be so construed as to apply to this employer and these employees and this question or controversy it would be unconstitutional in violation of the provisions of the Constitution of the United States as an invalid interference with commerce among the several states and with foreign nations." (Stenographic Minutes of Hearing, pages 4, 5.)

At the hearing before the Trial Examiner on November 24, 1944, I moved to set aside the above-mentioned subpoenas and subpoena duces tecum upon the grounds above stated and upon the additional ground that the documents and evidence sought to be produced are not relevant or material to any issue in the State Board proceeding. The Trial Examiner denied such motion and, on behalf of the [fol. 63] Company, I refused to make return to the subpoena duces tecum.

I refused on behalf of the Company to comply with the above-mentioned subpoena duces tecum addressed to the Company, because in my opinion the documents and evidence called for by such subpoena are not relevant or material to any issue in the State Board proceeding and because the subject matter of such proceeding is within the exclusive jurisdiction of the National Labor Relations Board (hereinafter called the National Board) under the National Labor Relations Act (hereinafter called the National Act) and is not within the jurisdiction of the State Board under the State Act. The pertinent facts relating to the operations of the Company at the Lackawanna Plant are set forth in an affidavit of Mr. Edward F. Entwisle which is to be filed herewith.

Counsel for the Foreman's Association conceded at the hearing before the Trial Examiner that the Company is engaged in interstate commerce at the Lackawanna Plant (Stenographic Minutes of Hearing, pages 123, 124). The National Board has heretofore determined in four cases that the National Act applies to the Lackawanna Plant and

to questions or controversies concerning the representation of employees of the Company at such Plant. Such cases are as follows:

(1) *Matter of Bethlehem Steel Corporation, Bethlehem Steel Company, and South Buffalo Railway Co. and Steel Workers Organizing Committee, Local Union 1024, C. I. O.*, Case No. R-2415, 30 N. L. R. B. 1006, 32 N. L. R. B. 264 (1941). In that case the National Board held that a question concerning the representation of certain production [fol 64] and maintenance employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to the provisions of Subsection (a) of Section 9 of the National Act, Steel Workers Organizing Committee, Local Union 1024, C. I. O., was the exclusive representative of such production and maintenance employees for the purposes of collective bargaining.

(2) *Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and American Federation of Labor*, Case No. R-4846, 47 N. L. R. B. 1330 (1943). In that case the National Board held that a question concerning the representation of certain plant protection employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to subsection (a) of Section 9 of the National Act, the American Federation of Labor was the exclusive representative of such plant protection employees for the purposes of collective bargaining.

(3) *Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and United Steelworkers of America, C. I. O., District 4*, Case No. 3-R-639, 52 N. L. R. B. 1217 (1943). In that case the National Board held that a question concerning the representation of certain employees of the Company in the Order Department at the Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting [fol 65] an election among such employees, the National Board certified that, pursuant to subsection (a) of Section

9 of the National Act, United Steelworkers of America, C. I. O., District 4, was the exclusive representative of such employees for the purposes of collective bargaining.

(4) *Matter of Bethlehem Steel Company and American Federation of Labor, Federal Local 23332*, Case No. 3-R-735, 55 N. L. R. B. 658 (1944). In that case the National Board held that a question concerning the representation of certain employees of the Company in the Fire Department at the Lackawanna Plant was a question affecting commerce within the meaning of the National Act. After directing and conducting an election among such employees, the National Board certified that, pursuant to subsection (a) of Section 9 of the National Act, American Federation of Labor, Federal Local 23332, was the exclusive representative of such employees for the purpose of collective bargaining.

The National Board has held, furthermore, that supervisory employees are employees within the meaning of that Act. *Matter of Sass Manufacturing Co. and Foreman's Association of America*, Case No. 7-C-1148; and *Republic Steel Corp. and Foreman's Association of America*, Case No. 8-C-1569, 56 N. L. R. B. No. 70 (1944).

The State Board introduced in evidence in the State Board proceeding a letter from the Regional Director of the National Board for the Third Region addressed to the Regional Attorney of the State Board from which it appears that, if the Foreman's Association had filed with the National Board a petition under Section 9 of the National Act for investigation and certification of represen- [fol. 66] tatives of the supervisory employees at the Lackawanna Plant, the National Board would have taken jurisdiction over the petition and would have decided the controversy on its merits. A copy of such letter is annexed hereto as Exhibit A-1 and made a part hereof; and a copy of the letter from the Regional Attorney of the State Board, to which Exhibit A-1 was a reply, is annexed hereto as Exhibit A-2 and made a part hereof.

The "Board policy" to which the Regional Director of the National Board refers in his above-mentioned letter is the policy established by the National Board in its decision in *Matter of The Maryland Drydock Company and Local 31 of the Industrial Union of Marine and Shipbuild-*

ing Workers of America, Cases Nos. R-5212, R-5214, 49 N. L. R. B. 733 (1943), in which the National Board dismissed petitions for investigation and certification of representatives of supervisory employees of the employer there concerned. Such policy was expressed by the National Board in that case as follows:

> "We are of the opinion that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the process of collective bargaining, disrupt established managerial production techniques, *and militate against the effectuation of the policies of the Act.*" (Underscoring added.)

Such policy has been affirmed and applied by the National Board in a number of cases which have been decided by it since its decision in the *Maryland Drydock* case, including a number of cases arising on petitions of the Foreman's Association.

[fol. 67] The facts with regard to compliance by the individual respondents with the subpoenas which were served upon them in the State Board proceeding are as hereinafter set forth.

(a) Mr. Entwisle in response to the subpoena which was served upon him appeared and testified at the hearing before the Trial Examiner on November 24, 1944. He testified at length regarding the nature of the work performed by and the duties and responsibilities of the supervisory personnel at the Lackawanna Plant. He did not refuse to answer any questions which were put to him at such hearing, except certain questions as to the amount of compensation paid by the Company to twenty-one superintendents and department heads at the Lackawanna Plant and to three general foremen and a master mechanic and chief electrician at such Plant. In its petition to the State Board the Foreman's Association did not include such twenty-one superintendents and department heads in the alleged appropriate unit for the purposes of collective bargaining as set forth therein. At the hearing before the Trial Examiner the Foreman's Association stipulated that one of such general foremen should also be excluded from such unit. The State Board does not set forth in its petition herein the specific

questions, if any, which Mr. Entwisle did not answer at such hearing and which the State Board claims he can and should answer.

(b) Mr. Baker in response to the subpoena which was served upon him appeared and testified at an adjourned session of the hearing before the Trial Examiner which was held on November 25, 1944. At such hearing Mr. Baker testified at length regarding the functions of the Industrial [fol. 68] Relations Department at the Lackawanna Plant, of which Department he is head, and the duties and responsibilities of various members of the supervisory personnel at such Plant. His testimony covers over 40 pages of the stenographic minutes of such hearing. The only question that he refused to answer was a question as to the amount of his own salary. The Trial Examiner asked the following question and Mr. Baker gave the following answer (Stenographic Minutes of Hearing, page 597):

> "Q. What is your salary?
> "A. That I refuse to tell you."

Mr. Baker is not included in the alleged appropriate collective bargaining unit which is set forth in the petition of the Foreman's Association to the State Board. He represents the Company in negotiations with representatives of the production and maintenance employees at the Lackawanna Plant. Section 3 of Article V of the Constitution of the Foreman's Association provides as follows:

> "Section 3. No supervisory employee or individual acting as negotiator in formulating employer-policy may become a member of the Foreman's Association of America."

Because of his position as head of the Industrial Relations Department at the Lackawanna Plant Mr. Baker would not under such Section be eligible for membership in the Foreman's Association. The amount of his salary, therefore, could not be relevant or material to any issue in the State Board proceeding.

(c) William H. Peters, Jr., was unable because of illness to comply with the subpoena which was served on him. He had, however, at the request of the Trial Examiner volun- [fol. 69] tarily appeared at the hearing before the Trial

Examiner on November 11, 1944, and testified at length with regard to the operation of the Accounting Department at the Lackawanna Plant. He did not at that time refuse to answer any question asked of him by the Trial Examiner or by any other person present at such hearing.

At the hearing before the Trial Examiner on November 24, 1944, I advised the Trial Examiner that Mr. Peters was ill and I offered to produce a doctor's certificate to that effect, but the Trial Examiner stated that that would not be necessary. The stenographic minutes of my discussion with the Trial Examiner at that time concerning Mr. Peters read as follows:

> "Mr. McLain: • • • Do you want a statement for the record on Mr. Peters?
>
> "Trial Examiner: I take it the position you took now you would decline to—
>
> "Mr. McLain: Mr. Peters is ill.
>
> "Trial Examiner: Oh, that is unnecessary. He isn't here.
>
> "Mr. McLain: I could get a doctor's certificate.
>
> "Trail Examiner: No, no, that is entirely unnecessary. Let's forget about that."

No further request was made for the appearance of Mr. Peters and Mr. Peters did not at any time refuse to appear and to give testimony before the Trial Examiner.

(d) Mr. Dewitt complied with his subpoena by appearing and testifying at the hearing before the Trial Examiner on November 24, 1944. He testified at length under exami- [fol. 70] nation by the Trial Examiner and did not refuse to answer any question asked of him at the hearing.

Chester A. McLain.

Sworn to before me this 15th day of February, 1945.
Pauline H. Winkler, Notary Public, Erie Co., N. Y.

EXHIBIT A-1

National Labor Relations Board, Third Region, Genesee Building, Buffalo, New York

Frank M. Abbate, Regional Attorney, New York State Labor Relations Board, State Office Building, Buffalo (2), New York.

Re: Bethlehem Steel Co. and Foremen's Association of America, Bethlehem Steel Chapter No. 50

DEAR MR. ABBATE:

I have your letter of September 28. I remember your telephone call with respect to the above matter very well. I believe you have misunderstood, in part, my response to your queries over the telephone. I did state that if in the event a petition had been or were to be filed by the Foremen's Association with respect to seeking certification for the company's supervisory employees, in view of the Maryland Drydock decision, this office would not have proceeded to certification thereon and would have refused to issue notice of hearing (in other words, dismissed the petition). [fol. 71] However, I did not state that the national board "would refuse jurisdiction." Accepting a petition and then dismissing, as you know, is quite different from refusing to take jurisdiction. Inasmuch as the Bethlehem Steel Company is engaged in interstate commerce, if the Foremen's Association had filed a petition with the national board, the petition would have been accepted and docketed. Thereafter, under present Board policy we would have proceeded to refuse to issue notice of hearing in this matter on the merit basis that supervisory employees do not comprise an appropriate bargaining unit.

Please accept my assurance of cooperation in all matters. I hope that we can meet in the near future and get acquainted.

With best wishes.

Very truly yours, (Signed) M. S. Ryder, Regional Director.

MSR/c.

[fol. 72] EXHIBIT A-2

F. M. Abbate

September 28, 1944

Mr. Meyer S. Ryder, Regional Director, National Labor Relations Board, Genesee Building, Buffalo 2, New York.

Re: Bethlehem Steel Co. —and— Foreman's Association of America, Bethlehem Steel Chapter No. 50

DEAR SIR:

On August 24, 1944, the Foreman's Association of America, Bethlehem Steel Chapter No. 50, filed a petition with the New York State Labor Relations Board in which they claim to represent a majority of general foremen and supervisors, exclusive of superintendents, at the Bethlehem Steel Co., and as such requested that they be certified as the representative for the purposes of collective bargaining.

On the date that said petition was filed with this Board, I phoned you and asked if your Board wished to take jurisdiction over this matter. You stated to me at that time that the National Board would refuse jurisdiction, and that even if the petition had been filed with your Board, the same would have been dismissed.

Will you kindly, at your earliest convenience, confirm this conversation by letter.

Very truly yours, Frank M. Abbate, Regional Attorney.

[fol. 73] In Supreme Court of New York, Erie County

[Same title]

William E. Grady, Jr. (Frank M. Abbate, of Counsel) for Petitioner.

Cravath, Swaine & Moore, Kenefick, Cooke, Mitchell, Bass & Letchworth, for Respondents (Daniel J. Kenefick, Lyman M. Bass and C. A. McLain, of Counsel).

Memorandum Decision of Mr. Justice Batt

Batt, J.:

The respondents in their opposition to the petition have raised an important question under the Federal Constitution which goes to the jurisdiction of the New York State Labor Relations Board over the subject matter of the above proceeding in which said Board issued the subpoenas which it here seeks to enforce. At the hearing on the order to show cause, the attorney for said Board cited the decision of the Court of Appeals in Matter of Davega-City Radio, Inc. v. State Labor Relations Board, 281 N. Y. 13 (1939), and the decision of Justice Hinkley in Allegheny Ludlum Steel Corporation v. Kelley, et al., 49 N. Y. Supp. (2nd) 762 (1944), as decisive of that question in this Court. The latter case is now on appeal to the Appellate Division of this Court.

The constitutional question here raised is of such far reaching importance, not only to the parties to this action but also to industry generally in this State, that it is in the interest of all concerned that such question be finally determined as promptly as is consistent with orderly judicial procedure.

[fol. 74] Whether or not the Court of Appeals shall ultimately determine that its decision in the Davega-City Radio case, supra, is decisive of that question in the instant case, I feel that I should treat that decision as controlling here. I also feel that I should follow the opinion of Mr. Justice Hinkley in the Allegheny Ludlum Steel case, supra, on that question. Accordingly, I have granted the petition of the New York State Labor Relations Board herein as to the respondents.

Dated March 1, 1945.

Paul J. Batt, Justice of Supreme Court.

[fols. 75-78] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] In Supreme Court of New York, County of Erie

In the Matter of the Application of
New York State Labor Relations Board, Petitioner-Respondent

For an Order

against

Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

Notice of Appeal to Court of Appeals

Sirs:

Please Take Notice that the above-named respondents-appellants hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the Fourth Department entered in the office of its Clerk on May 2, 1945, a certified copy of which was filed and entered in the office of the Clerk of the County of Erie on or about the 5th day of May, 1945, affirming the final order made in the above-entitled action by Honorable Paul J. Batt at a Special Term, Part I, of the Supreme Court for the County of Erie and entered in the office of the Clerk of said County on or about the 1st day of March, 1945, which final order granted the application of New York State Labor Relations Board, the petitioner-respondent herein, for an order against the respondents-[fol. 80] appellants and directed the respondent-appellant, Bethlehem Steel Company, to produce certain documents and evidence in a proceeding pending before said Board entitled "In the Matter of Bethlehem Steel Company—and —Foreman's Association of America, Bethlehem Steel Chapter No. 50," and directed the respondents-appellants, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, to appear before a Trial Examiner designated by said Board and to testify and give evidence in said proceeding, all as more fully set forth in

said final order. This appeal is taken as of right from the whole and from each and every part of said order on the ground that there is directly involved the construction of the Constitution of the United States of America.

Dated, May 12, 1945.

Yours respectfully, Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y. Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents-Appellants.

To: William A. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner-Respondent. Clerk of the above-named Court.

[fol. 81] In Supreme Court of New York, Appellate Division

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William F. Dowling, Hon. Francis F. McCure, Hon. George A. Larkin, Hon. William F. Love, Associate Justices

In the Matter of the Application of

New York State Labor Relations Board, Respondent,

For an Order

against

Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, Appellants

Order of Affirmance Appealed From

The above named Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll Dewitt, respondents in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from certain parts of an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 1st day of March, 1945, and the said appeal having been submitted by Mr. Lyman Bass, of counsel for the appellants, and by Mr. William E. Grady, Jr., of counsel for the respondent, and due deliberation having been had thereon.

[fol. 82] It is hereby Ordered, That the order so far as appealed from be, and the same hereby is, affirmed with ten dollars costs and disbursements.

All concur.

Enter.

Marsh N. Taylor.

Entered 2nd day of May, 1945. (S.) Herbert E. Wait, Clerk.

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

John H. Morse, being duly sworn, deposes and says that he is an attorney associated with Cravath, Swaine & Moore, attorneys for the respondents-appellants herein, and is familiar with the facts and proceedings herein, that no opinion in writing was rendered by the Appellate Division in making the order appealed from.

John H. Morse.

Sworn to before me this 28th day of May, 1945.
Saul Schneiderman, Notary Public, Kings County.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 29th day of November in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—November 30, 1945

In the Matter of the Application of

NEW YORK STATE LABOR RELATIONS BOARD, Petitioner-Respondent,

For an Order

against

BETHLEHEM STEEL COMPANY, EDWARD F. ENTWISLE, CHAUNCEY L. BAKER, William H. Peters, Jr., and J. Driscoll Dewitt, Respondents-Appellants

Be it Remembered, That on the 2nd day of June in the year of our Lord one thousand nine hundred and forty-five, Bethlehem Steel Company and others, the appellants in this cause, came here unto the Court of Appeals, by Cravath, Swaine & Moore and Kenefick, Cooke, Mitchell, Bass & Letchworth, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the [fol. 85] order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And New York State Labor Relations Board, the respondent-in said cause, afterwards appeared in said Court of Appeals by William E. Grady, Jr., its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. C. A. McLain, of counsel for the appellants, and by Mr. William E. Grady, Jr., of counsel for the respondent-, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law. And afterwards, to wit, on the seventh day of December, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, [fol. 86] to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(S.) John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, November 30, 1945:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) John Ludden, Clerk.

(Sealed.)

[fol. 87] In Court of Appeals of New York

Present, Hon. John T. Loughran, Chief Judge, presiding.

In the Matter of the Application of New York State Labor Relations Board, Petitioner-Respondent, for an Order against Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Respondents-Appellants

Order Amending Remittitur—December 7, 1945

A motion to amend the remittitur in the above cause being duly made herein upon the part of the respondents-appellants, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the remittitur amended by adding thereto the following:

"A question under the Constitution of the United States was presented and necessarily passed upon. The appellants contended that the question or controversy

over which the State Labor Relations Board asserted jurisdiction is covered by the National Labor Relations Act and is within the exclusive jurisdiction of the National Labor Relations Board; and that the exclusive character of the jurisdiction of the Federal government in such cases derives from the provisions of Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States. This court rejected that contention."

And the Supreme Court, Erie County, State of New York, is hereby requested to direct its Clerk to return said remit- [fol. 88] titur to this Court for amendment accordingly.

Further Ordered that the stay be and the same hereby is continued.

Raymond J. Cannon, Deputy Clerk. (Seal of Court of Appeals.)

[fol. 89] In Court of Appeals of New York

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Respondents-Appellants in the above-entitled cause (hereinafter together called the Petitioners), respectfully show by this petition, and the Assignment of Errors filed herewith, that in the records, proceedings and decision of this Court in the above-entitled cause, this Court being the highest court of the State of New York in which a decision could be had in said cause, and said decision being a final judgment, manifest error has occurred, greatly to the damage of the Petitioners, in that, as appears in said records and proceedings, there was drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution or laws of the [fol. 90] United States, and the final judgment of this Court is in favor of the validity of said statute, which statute is

The New York State Labor Relations Act (Laws of 1937, Chapter 443; as amended by Laws of 1942, Chapter 518; 30 McKinney's Consolidated Laws of New York, §§ 700-716).

Wherefore your Petitioners hereby respectfully pray that they be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in the above-entitled cause on November 29, 1945, for the reasons specified in the Assignment of Errors accompanying this petition; that a proper order be made with regard to the appeal bond to be given by the Petitioners; that a citation issue as provided by law; and that the material parts of the record, proceedings and papers upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

ASSIGNMENT OF ERRORS

Your Petitioners complain that the Court of Appeals of the State of New York committed manifest error to the prejudice of your Petitioners in the above-entitled cause and assign the following errors in the record and proceedings herein upon which they will rely on their appeal to the Supreme Court of the United States (each numbered paragraph being a separate assignment of error):

I. The Court of Appeals of the State of New York erred in rejecting the contention of your Petitioners [fol. 91] that the question or controversy over which the New York State Labor Relations Board sought to assert jurisdiction under the New York State Labor Relations Act in the proceeding before said Board in which were issued the subpoena *duces tecum* and subpoenas which said Board sought to enforce in this cause is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act and is not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

II. The Court of Appeals of the State of New York erred in failing and refusing to hold that under the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States the New

York State Labor Relations Act cannot have any lawful application to the aforesaid question or controversy.

III. The Court of Appeals of the State of New York erred in affirming the order of the Supreme Court of the State of New York for the County of Erie which was made and entered in this cause on March 1, 1945.

IV. The Court of Appeals of the State of New York erred in failing and refusing to reverse said order of the Supreme Court of the State of New York for the County of Erie and to direct that the application of [fol. 92] Petitioner-Respondent in this cause for the enforcement of its subpoena *duces tecum* and subpoenas be denied.

V. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court for the Fourth Judicial Department of the State of New York which was made and entered in this cause on May 2, 1945, and which affirmed the aforesaid order of the Supreme Court of the State of New York for the County of Erie.

VI. The Court of Appeals of the State of New York erred in failing and refusing to reverse said order of the Appellate Division of the Supreme Court for the Fourth Judicial Department of the State of New York.

PRAYER FOR REVERSAL

Wherefore, your Petitioners pray that the said final judgment of this Court, made and entered on November 29, 1945, in the above-entitled cause, be reversed and a judgment rendered in favor of your Petitioners, with costs, and for such other and further relief as to this Court may seem just and proper.

February 16th, 1946.

Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y.; Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents-Appellants.

Daniel J. Kenefick, C. A. McLain, Bruce Bromley, of Counsel.

[fol. 93] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

Bethlehem Steel Company, Edward E. Entwisle, Chauncey L. Baker, William H. Peters, Jr. and J. Driscoll DeWitt, Respondents-Appellants in the above-entitled cause, having filed their Petition for Appeal, praying that they be permitted to take an appeal to the Supreme Court of the United States from the final judgment of this Court, made and entered in said cause on November 29, 1945, and having also made and filed with said Petition their Assignment of Errors, Prayer for Reversal, and their Statement as to Jurisdiction, it is hereby

Ordered that said appeal be, and the same hereby is, allowed as prayed for, and that an appeal bond in the sum of $500.00 be filed by or on behalf of said Respondents-Appellants, with good and sufficient surety.

February 16th, 1946.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 94-96] Citation in usual form showing service on William E. Grady, Jr., omitted in printing.

[fols. 97-98] Bond on Appeal for $500.00 omitted in printing.

[fol. 99] IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above-Named Court:

In connection with the preparation of the transcript of record on appeal herein the respondents request that you prepare and include as part of such transcript the following

and certify the same to the Supreme Court of the United States:

1. All of the papers included in the printed papers on appeal to the Court of Appeals of the State of New York certified by you on May 29, 1945, and now on file in your office and attached to the Remittitur, as amended, of the Court of Appeals of the State of New York.

2. Remittitur (Judgment) of Court of Appeals of the State of New York dated November 29, 1945.

3. Order of Court of Appeals of the State of New York dated December 7, 1945, amending Remittitur.

4. Order of the Supreme Court of the State of New York, County of Erie, dated January 7, 1946, making the order [fols. 100-102] and judgment of the Court of Appeals of the State of New York, as amended, the order and judgment of the Supreme Court of the State of New York, County of Erie.

5. Petition for Appeal, Assignment of Errors and Prayer for Reversal.

6. Order Allowing Appeal.

7. Statement as to Jurisdiction.

8. Notice calling attention to the provisions of Supreme Court Rule 12(3).

9. Citation on Appeal.

10. Appeal Bond.

11. Proof of service.

12. This Praecipe and proof of service thereof.

February 18, 1946.

Yours, etc., Cravath, Swaine & Moore, 15 Broad Street, New York, N. Y.; Kenefick, Cooke, Mitchell, Bass & Letchworth, Marine Trust Building, Buffalo, N. Y., Attorneys for the Respondents.

To: William E. Grady, Jr., 250 West 57th Street, New York, N. Y., Attorney for the Petitioner.

Acknowledgment of Service

Service of a copy of the foregoing Praecipe is acknowledged this 19th day of February, 1946.

William E. Grady, Jr., Counsel for Petitioner.

[fol. 103] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION—Filed March 15, 1946

Appellants, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, state that the points upon which they intend to rely in said Court in this case are as follows:

1. Appellants hereby adopt their Assignment of Errors as and for their Statement of Points upon which they intend to rely in this case.

Appellants hereby designate for the record in this case each and every paper enumerated in their Praecipe dated February 18, 1946, and served and filed herein, as necessary for the consideration thereof.

March 13, 1946.

Bruce Bromley, Counsel for Appellants, 15 Broad Street, New York 5, N. Y.

To: William E. Grady, Jr., Esq., Counsel for Appellee, 250 West 57th Street, New York, N. Y.

[fol. 104] ACKNOWLEDGMENT OF SERVICE

Service of a copy of the foregoing Statement of Points and Designation is hereby acknowledged this 14th day of March, 1946.

William E. Grady, Jr., Counsel for Appellee, by Hilda Abramson, Secretary.

[fol. 104½] [File endorsement omitted.]

[fol. 105] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 22, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with No. 1048, Allegheny Ludlum Steel Corporation vs. Kelley et al. for argument. The Solicitor General of the United States is requested to

file a brief as *amicus curiae* and, if so advised, to participate in the oral argument.

Mr. Justice Jackson took no part in the consideration or decision of this order.

Endorsed on cover: File No. 50,644. New York Court of Appeals. Term No. 55. Bethlehem Steel Company, Edward F. Entwisle, Chauncey L. Baker, William H. Peters, Jr., and J. Driscoll DeWitt, Appellants, vs. New York State Labor Relations Board. Filed March 12, 1946. Term No. 55, O. T., 1946.

Act would be repugnant to the provisions of the Constitution and laws of the United States as an invalid interference with commerce among the several states.

By an order of Mr. Justice Paul J. Batt made at a Special Term of said Supreme Court the Company was directed to produce such documents and evidence pursuant to said subpoena *duces tecum* and the individual appellants were directed to testify and give evidence before the State Board pursuant to said subpoenas which were directed to them, respectively (R. 2). Said order of said Supreme Court was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York (R. 60). The final decree of the Court of Appeals of the State of New York, a review of which is here sought, affirms said order of said Appellate Division (R. 62).

The petition for appeal to this Court was presented to the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York on February 16, 1946, and the appeal was allowed on that date (R. 64, 67).

The State Board Proceeding

The State Board proceeding, in which such subpoena *duces tecum* and subpoenas were issued, is a proceeding brought by the State Board under Section 705 of the State Act for the investigation and certification of representatives for the purposes of collective bargaining of certain supervisory employees at the Lackawanna Plant of the Company. The State Board proceeding arose out of an amended petition filed on or about October 20, 1944, with the State Board by Foreman's Association of America, Bethlehem Chapter 50, for the certification under Section 705 of the State Act of that Association as the exclusive collective bargaining representative of employees of the Company in an alleged appropriate unit consisting of foremen, general foremen

and supervisors, exclusive of superintendents, at the Lackawanna Plant. In said petition, the Foreman's Association claimed to represent a majority of the persons in said unit (R. 37, 48, 57).

The Company

The Company is a Pennsylvania corporation licensed to do business in the State of New York. It is engaged, among other things, in the production and sale of steel and steel products. It owns and operates plants engaged in the production of steel and steel products in the States of New York (including the Lackawanna Plant), Pennsylvania, Maryland, California and Washington. Its Lackawanna Plant is the only plant involved in the State Board proceeding. The Company employs at such plant approximately 11,100 persons, of whom approximately 650 are included in the supervisory classifications which the Foreman's Association seeks to represent (R. 38).

During the calendar year 1943, the Company produced at the Lackawanna Plant finished steel products valued in excess of $122,000,000, of which more than 80% was shipped from such plant to points outside the State of New York. More than 90% (in value) of all raw materials used at the Lackawanna Plant during 1943 was delivered to such plant from points outside the State of New York (R. 38).

The Foreman's Association

The Foreman's Association, according to its constitution, is a voluntary association of supervisory employees. One of its stated purposes is "to confer and act upon measures for the protection and advancement of the economic welfare of supervisory employees through collective bargaining." Under its constitution it admits to membership "Any employee of good moral character, whose duties require the supervision of other employees, or who directs work, who may or

may not supervise other employees, and who is not a member of any other organization recognized by his employer as representing him in collective bargaining" (R. 48).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of the State of New York erred:

1. In rejecting the contention of appellants that the question or controversy over which the New York State Labor Relations Board sought to assert jurisdiction under the New York State Labor Relations Act in the proceeding before said Board in which were issued the subpoena *duces tecum* and subpoenas which said Board sought to enforce in this case is a question or controversy exclusively within the jurisdiction of the National Labor Relations Board under the National Labor Relations Act and is not within the jurisdiction of the New York State Labor Relations Board under the New York State Labor Relations Act.

2. In failing and refusing to hold that under the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States the New York State Labor Relations Act cannot have any lawful application to the aforesaid question or controversy.

SUMMARY OF ARGUMENT

I

The appellants contend that the National Act applies to any controversy with regard to the representation of the Company's supervisory personnel at its Lackawanna Plant. The Company manufactures steel and steel products with plants in five states. During the calendar year 1943, more than 80% of the finished steel products produced at its Lackawanna Plant was shipped in interstate commerce and more than 90% of all raw materials used at that plant was delivered from points outside the State of New York. The National Board has already applied the National Act in

five different cases to five different groups of the Company's employees at the Lackawanna Plant. The National Board has held that supervisors are employees within the meaning of that term as used in the National Act. Finally, it was established as a matter of fact in the proceedings below that, if the Foreman's Association had filed with the National Board a petition for certification under Section 9 of the National Act, the National Board would have assumed jurisdiction and would have determined the controversy regarding such representation on its merits. In this connection it is important to note that the employer has no right, power or status to invoke the jurisdiction of the National Board.

II

The appellants contend that the State Board does not have jurisdiction over the subject matter of the State Board proceeding because such subject matter is governed exclusively by the National Act. Since the provisions of the National Act apply to the controversy involved in the State Board proceeding, the State Act cannot have any application to such question and the State Board does not, therefore, have any jurisdiction to determine it. The exclusive character of the jurisdiction of the Federal Government derives from the provisions of the United States Constitution, Article I, Section 8, and Article VI, Clause 2. The effect of those Constitutional provisions is to invalidate any state regulation which attempts to cover the same ground as is covered by a valid regulation of the Federal Government in pursuance of its power over interstate commerce.

The purpose of Congress in enacting the National Act was to regulate interstate labor relations by a national agency as a national problem on a national scale. Since both Acts cover precisely the same field, the State Act should be held unconstitutional when sought to be applied to interstate labor relations. The fact that there are differing and con-

flicting provisions in the two Acts reinforces the conclusion of unconstitutionality. While the rulings of the State Board under the State Act are now in conformity with the rulings of the National Board with respect to foremen, they have not been so in the past and there is no assurance of conformity in the future. The fact that the National Board has taken jurisdiction over the matter of the representation of certain of the Company's employees at the Lackawanna Plant is a sufficient exercise of the Federal jurisdiction to exclude state interference with respect to other of the Company's employees at such plant.

ARGUMENT

The central issue in this case is the narrow and important question of whether in the circumstances here disclosed the State Board can constitutionally act with respect to a certain class of employees in interstate commerce as to which the National Board has not acted. The fact that both Acts cover precisely the same field, with various conflicting provisions, however, as to permissible units of representation, would seem to dispose of the question against the existence of state power. When there is added to that legislative conflict the danger of conflicting administrative policy, which latter conflict has existed in the past and may exist in the future, together with the assumption of jurisdiction over some of the Company's employees by the National Board, the conclusion of unconstitutionality becomes inescapable.

POINT I

THE NATIONAL ACT APPLIES TO ANY QUESTION OR CONTROVERSY WITH REGARD TO THE REPRESENTATION OF THE SUPERVISORY PERSONNEL AT THE LACKAWANNA PLANT FOR THE PURPOSES OF COLLECTIVE BARGAINING WITH THE COMPANY.

The National Board has heretofore determined in five cases that the National Act applies to the Lackawanna

Plant and to questions or controversies concerning the representation of employees of the Company at that Plant (R. 51).

Matter of Bethlehem Steel Corporation, Bethlehem Steel Company, and South Buffalo Railway Co. and Steel Workers Organizing Committee, Local Union 1024, C. I. O., 30 N.L.R.B. 1006, 32 N.L.R.B. 264 (1941), (production and maintenance employees);

Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and American Federation of Labor, 47 N.L.R.B. 1330 (1943), (plant protection employees);

Matter of Bethlehem Steel Corporation and Bethlehem Steel Company and United Steelworkers of America, C. I. O., District 4, 52 N.L.R.B. 1217 (1943), (order department employees);

Matter of Bethlehem Steel Company and American Federation of Labor, Federal Local 23332, 55 N.L.R.B. 658 (1944), (fire department employees);

Matter of Bethlehem Steel Company and United Steelworkers of America, C. I. O., Cases Nos. 3-R-1145, 3-R-1146 (1946), (clerical employees, mechanical strip mill).

In each of such cases the National Board held that a question concerning the representation of certain employees of the Company at its Lackawanna Plant was a question affecting commerce within the meaning of the National Act. In each case, after directing and conducting an election among such employees, the National Board certified, pursuant to the provisions of subsection (a) of Section 9 of the National Act, that a named labor organization was the exclusive representative of the employees concerned for the purposes of collective bargaining.

Furthermore the National Board has held that supervisors are employees within the meaning of the term "employees" as it is used in the National Act. *Matter of Soss*

Manufacturing Co. and Foreman's Association of America, 56 N.L.R.B. 348 (1944); *Matter of Republic Steel Corp. and Foreman's Association of America*, 56 N.L.R.B. 348 (1944); *Matter of Packard Motor Car Company and Foreman's Association of America*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945); see also *National Labor Relations Board v. Skinner & Kennedy Stationery Company*, 113 F. (2d) 667 (C. C. A. 8th, 1940); *National Labor Relations Board v. Packard Motor Car Company*, F. (2d) , (C. C. A. 6th, August 12, 1946).

The State Board itself introduced and there was received in evidence in the State Board proceeding in this case a letter from the Regional Director of the National Board for the Third Region to the State Board in which it was stated that, if the Foreman's Association had filed with the National Board a petition under Section 9 of the National Act for the investigation and certification of representatives of the supervisory employees here involved, the National Board would have assumed jurisdiction over such petition and would have determined on its merits the question or controversy regarding such representation. In that letter the Regional Director said, in part (R. 56):

> "***I did state that if in the event a petition had been or were to be filed by the Foremen's Association with respect to seeking certification for the company's supervisory employees, in view of the Maryland Drydock decision, this office would not have proceeded to certification thereon and would have refused to issue notice of hearing (in other words, dismissed the petition). However, I did not state that the national board 'would refuse jurisdiction.' Accepting a petition and then dismissing, as you know, is quite different from refusing to take jurisdiction. Inasmuch as the Bethlehem Steel Company is engaged in interstate commerce, if the Foremen's Association had filed a petition with the national board, the petition would have been accepted and docketed.

> Thereafter, under present Board policy we would have proceeded to refuse to issue notice of hearing in this matter on the merit basis that supervisory employees do not comprise an appropriate bargaining unit." (Underscoring added.)

There can, therefore, be no doubt that the question or controversy over which the State Board in the State Board proceeding seeks to assert jurisdiction is covered by the National Act and is within the jurisdiction of the National Board.

POINT II

THE STATE BOARD DOES NOT HAVE JURISDICTION OVER THE SUBJECT-MATTER OF THE STATE BOARD PROCEEDING, BECAUSE SUCH SUBJECT-MATTER IS GOVERNED EXCLUSIVELY BY THE NATIONAL LABOR RELATIONS ACT.

The provisions of the National Act authorize the determination by the National Board of the question or controversy concerning the representation of supervisory employees at the Lackawanna Plant over which the State Board in the State Board proceeding has sought to take jurisdiction under the State Act. That being so, the State Act cannot have any application to such question or controversy and the State Board does not, therefore, have jurisdiction to determine such question or controversy.

The exclusive character of the jurisdiction of the Federal Government in such cases derives from the provisions of the United States Constitution which confer upon the Congress the power "To regulate Commerce with foreign Nations, and among the several States" (Article I, Section 8), and which expressly provide in the following language for the supremacy of the Constitution and of the laws of the United States made thereunder (Article VI, Clause 2):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The effect of those Constitutional provisions is to invalidate any State regulation which attempts to cover the same ground as is covered by a valid regulation of the Federal Government in pursuance of its power over interstate commerce.

A. The Purpose of Congress in Enacting the National Act Was to Regulate Interstate Labor Relations by a National Agency as a National Problem on a National Scale.

The Federal Government was first in the field, the National Act having been approved on July 5, 1935, while the State Act was not approved by the Governor of the State of New York until May 20, 1937.

The declared purpose of the National Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. The National Act formulated a comprehensive scheme for the regulation of labor relations. At the time the National Act was adopted there was no State regulation in the field. There is no reason to believe that the adoption of such Act constituted an invitation to the States to adopt similar legislation of their own covering employees in interstate commerce.

Prior to the passage of the National Act employers frequently refused to recognize that particular unions were authorized to represent the employees they claimed as members and the strike was in many cases the only method by which the union could prove its authority to speak. The sections of the National Act with which we are here concerned were designed to provide a means of ending, in so far as possible, any uncertainty as to whether a given union represented those employees for whom it claimed the right to speak. The position taken by the State Board that it may

conduct certification proceedings among employees engaged in interstate commerce would not add to the certainty and uniformity which the National Act seeks to produce. Conflicts must result if a minority, dissatisfied with being grouped in a particular unit by one Board, applies to the other Board, and is by that Board certified as an appropriate bargaining unit. Chaotic conditions would result from the shopping around which would inevitably result, if it be determined that both Boards have concurrent jurisdiction. Stability in labor relations will not result, if a determination by one Board upon the basis of which contracts are entered into may be upset at will by a determination of another Board with supposedly concurrent jurisdiction upon an application to it by the members of one of the contracting parties. The employer cannot remedy the situation by making direct application to the National Board since its rules do not permit such application. No principle of *res judicata* can mitigate this situation, since the controversy regarding representation can always be treated as a new controversy by the competing Board.

It cannot be supposed that the Congress intended to make possible the chaotic condition which the State Board suggests. It is apparent that the Congress intended that the National Board should have exclusive jurisdiction of certification proceedings affecting employees in interstate commerce. If the creation of the National Board was a step necessary to insure the free flow of commerce that flow will necessarily be impeded by the intrusion of the State Board into a field in which the National Board may exercise its discretion.

Since the National Act is broad enough in scope to cover the entire problem of certification of bargaining agents for units of employees engaged in interstate commerce, and since the National Act sets up what has proved to be adequate machinery for this purpose, and since at the time the National Act was passed the States had not set up any ma-

chinery for conducting certification proceedings, it is clear that the Congress did intend to occupy the field.

There can be no doubt that the National Act and the State Act, as the State Board seeks to apply it, can not "move freely within the orbits of their respective purposes without impinging upon one another" (*Union Brokerage Co. v. Jensen*, 322 U. S. 202, 207 (1944)).

The Supreme Court has, indeed, specifically stated that the National Act was addressed to a national problem which it intended to solve upon a national scale.

National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 123 (1944).

Since the National Act is "intended to solve a national problem on a national scale", there would not seem to be any excuse whatever for permitting the State to attempt to assume the functions of the National Board and thereby to interfere with the orderly administration of the National Act. In *Southern Pacific Co. v. State of Arizona*, 325 U. S. 761 (1945), Mr. Justice Stone, writing for the majority, said in part (at page 767):

> "But ever since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."

It should be noted, moreover, as showing the intention of the Congress that the National Act should be exclusive of State regulation of the same subject matter, that, unlike other recent Federal legislation, the National Act does not contain any provision to the effect that it shall not be deemed to exclude such State regulation. If the Congress had intended that the National Act should not exclude such State regulation, it is fair to assume that the National Act would have expressly so provided. Thus, the Fair Labor

Standards Act of 1938 (29 U. S. C. § 218) specifically provides that no provision of that Act shall excuse non-compliance with any Federal or State Law establishing a minimum wage higher than the minimum wage established under such Act or a maximum work week lower than the maximum work week established under such Act. So also, the Securities Exchange Act of 1934 (15 U. S. C. § 78 bb) specifically provides that nothing in such Act shall affect the jurisdiction of the securities commission of any State over any security or person in so far as it does not conflict with the provision of such Act.*

As was indicated in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 327 U. S. —, 66 S. Ct. 906, 917 (1946), in order to preserve the power of the States, a Federal Act must contain an express saving clause, in a case such as the one at bar, "if the usual rules of supersedure are to be overcome."

Senator Walsh, reporting for the Committee on Education and Labor, said of the bill (S. 1958) which later became the National Labor Relations Act:

> "* * * While this bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power in preventing these unfair labor practices." (Sen. Rep. No. 573, 74th Cong., 1st Sess., p. 19.)

Thus, the United States Supreme Court, in its decision in *Hill v. Florida*, 325 U. S. 538 (1945) held that a statute of the State of Florida requiring a business agent of a labor organization to obtain a State license before acting as such within the State was invalid, because it interfered with the "full freedom" of collective bargaining which is guaranteed to employees by the National Act.

In the case at bar the action which the State Board has

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* See also, the Investment Company Act of 1940 (15 U.S.C. § 80a-49).

taken does affect the status of the Company's employees as such and their collective bargaining rights. The intrusion of the State Board cannot be reconciled with the National Act.

It is apparent that the action of the State Board in taking jurisdiction in certification proceedings involving interstate commerce is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the National Act (*Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)).

The position of the appellants hereinbefore set forth is not inconsistent with the decision of the United States Supreme Court in *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942). In that case the Wisconsin Employment Peace Act made it an unfair labor practice for an *employee* to engage in certain forms of intimidation and coercion and the Wisconsin Employment Relations Board acting pursuant to such Act had issued an order directing the Local, its officers, agents and members, to cease and desist from mass picketing, threatening employees, obstructing or interfering with the factory entrances or the free use of public roads, streets and highways and picketing the domiciles of employees. The United States Supreme Court upheld a judgment of the Supreme Court of Wisconsin affirming and enforcing such order. The Local had contested the validity of the order on the ground that the Company was subject to the National Labor Relations Act and that the Wisconsin Board had no jurisdiction in the case. The United States Supreme Court expressly limited its decision to those parts of the Wisconsin Act which prohibited the unfair labor practices in question and it expressed "no opinion as to the validity of other types of orders in cases where the federal Board has not assumed jurisdiction." Since the National Act does not purport to prohibit unfair labor practices on the part of *employees*, the

United States Supreme Court held that there was not any conflict between such provisions of the Wisconsin Act and any provisions of the National Act and that the provisions of the Wisconsin Act on which the order was based constituted a valid exercise of the police power of the State to prohibit the kinds of acts to which the order was directed. In other words, the provisions of the Wisconsin Act there in question covered a separate and different field from that which is covered by the National Act and therefore they did not interfere with or unduly burden interstate commerce.

B. Since Both Acts Cover Precisely the Same Field the State Act Should be Held Unconstitutional When Sought to be Applied to Interstate Labor Relations. The Fact That There Are Differing and Conflicting Provisions in the Two Acts Reinforces the Conclusion of Unconstitutionality.

It is clear that both Acts cover precisely the same field.

In considering the validity of a State statute which affects interstate commerce, two distinct questions are presented and must be carefully distinguished.

In the first place, the commerce clause of the Federal Constitution delegates to the Congress the power to regulate interstate commerce. In conferring that power upon the Congress the framers of the Federal Constitution intended that interstate commerce should be protected against State legislation which might obstruct the free flow of such commerce. They intended that such commerce should be subject to uniform regulations of the Federal Government in the interest of the nation as a whole and should be untrammeled by legislation of particular States which might not be in the interest of the nation as a whole.

Thus, in *Brown, et al. v. Houston, et al.*, 114 U. S. 622 (1885) Mr. Justice Bradley, delivering the opinion of the Court, said in part (at page 630):

> "The power to regulate commerce among the several States is granted to Congress in terms as abso-

lute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and inter-State commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction.***" (Underscoring added.)

Accordingly, State legislation which obstructs the free flow of interstate commerce or constitutes an undue burden upon that commerce is invalid, even if the Congress has not undertaken to legislate with regard to the particular phase of interstate commerce which is affected by such State legislation.

Thus, in *The Passenger Cases*, 7 How. 282 (1849), the United States Supreme Court held invalid a statute of the State of New York which imposed a tax upon vessels entering the Port of New York. The Court in those cases rejected the proposition that the States have a general concurrent power to regulate interstate commerce in the absence of Congressional legislation relating to the same subject as that covered by the State regulation.

On the other hand, if the Congress has not acted with regard to a proper subject of State regulation and the State regulation, although incidentally affecting interstate commerce, does not obstruct the free flow of that commerce

and does not impose an undue burden upon it, the State statute will be held valid.

Thus, in *The Minnesota Rate Cases*, 230 U. S. 352 (1913), a statute of the State of Minnesota prescribing maximum rates of charge for the carriage of passengers and freight between points within the State was upheld.

When, however, a State statute purports to regulate a subject in the field of interstate commerce which is already regulated in the same manner by an Act of the Congress, the State statute must give way and the Act of the Congress must prevail. Furthermore, by the express mandate of the Federal Constitution it becomes the duty of the judges of the State courts in cases coming before them to recognize the supremacy of the Act of the Congress and to deny enforcement of the State statute to the extent that the assertion of jurisdiction by the State under such statute comes into conflict with the exclusive jurisdiction of the Congress over the subject-matter of such statute.

Whether or not such a conflict of jurisdiction exists and the extent of any such conflict must, of course, depend on the facts of the particular case.

It is also clear that there are a number of fundamental conflicts between the provisions of the two Acts here in question.

The two Acts prescribe divergent limits within which the respective Boards may determine appropriate bargaining units. Section 9(b) of the National Labor Relations Act provides:

> "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (Underscoring added.)

Section 705, paragraph 2, of the State Act provides:

> "The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining." (Underscoring added.)

Thus the State Board has the power to designate a "multiple employer unit" or "any other unit" as appropriate. The power granted by the Congress to the National Board is not so wide. In fact, the Conference Report (House Report No. 1731) of the Senate and House of Representatives on the bill (S. 1958) which later became the National Act clearly shows that by House Amendment No. 11 the phrase "or other unit" was eliminated from Section 9(b) because it would allow too wide a choice of types of units (*Congressional Record*, June 27, 1935, 74th Cong., 1st Sess., Vol. 79, Part 9, pp. 10259, 10298-10299).

In some other respects, however, the State Board is more limited than the National Board. The latter, for example, may determine the proper unit to be "the employer unit, craft unit, plant unit, or subdivision thereof." The State Board, however, cannot determine that the appropriate unit is other than a craft unit, if a majority of the employees of a particular craft vote for a craft unit.

The most important respect in which the State Board is limited in its desig ation of an appropriate unit lies in its inability to designate an employer unit where the employer also has plants in other states, as in the instant case. An "employer unit", under the terms of both the State and

the National Acts, is one of the units which may be found to be appropriate. But if an employer's plants are in more than one state, the National Board can, but the State Board can *not*, certify an employer unit; because the State Board cannot have jurisdiction over employees in other states.

The two Acts also differ in the purposes and policies declared in each of them. The differing policies behind each Act are binding upon the respective Boards, and in each Act their effectuation is explicitly required to be the basis of a decision with respect to an appropriate bargaining unit. Section 1 of the National Act provides, in part:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . ."

Section 700 of the State Act, after stating the finding of the Legislature that the denial of the right to organize and refusal to recognize the procedure of collective bargaining lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health," declares:

> "This article shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health and peace of the people of the state."

Thus, there may be conflicting decisions as to whether a unit is appropriate, depending upon whether the deciding Board seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" or to protect "the public welfare, prosperity, health and peace of the people". The National Act is designed to preserve "the balance of economic forces upon which the full flow of commerce depends" (Senate Report No. 573, 74th Cong., 1st Sess., p. 19; *Cf. National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31-32 (1937)).

Thus, aside from the legislative differences, there must of necessity be a difference in the approach of the two Boards by reason of their differing situations. The National Board must view the problem to be solved from a national standpoint, in the light of experience on a national scale, and with considerations of a national scope in mind (*Cf. National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 123 (1944)). The State Board's duty and inclinations can not extend beyond the State's borders.

Another source of conflict between the State and National Acts lies in the fact that the decisions as to the appropriate unit in each case are left to administrative bodies. The decision as to what is an appropriate bargaining unit is more than a mere determination of fact. It involves the exercise of discretion (*May Department Stores Co. v. National Labor Relations Board*, 326 U. S. 376 (1945); *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 134 (1944)). It involves administrative policy and the constant revision and adaptation of such policy to changing circumstances and changing views with respect to expediency. To expect the two different Boards in such eddying circumstances to render similar decisions is to rely upon coincidence. That such coincidence does not always occur is shown by actual experience. The State Board's early determinations* that supervisory employees can constitute an appropriate bargaining unit were in direct conflict with the National Board's former *Maryland Drydock Company* (49 N.L.R.B. 733 (1943)) doctrine (*infra*, p. 34).

Finally, there is conflict between the two Acts in the very fact that they establish two different Boards charged with the duty of determining appropriate bargaining units for the purposes of collective bargaining.

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*See, e.g., *Matter of Williamsburgh Power Plant Corp.*, 1 N.Y.S.L.R.B. 653 (1938).

The very existence of the State Act, the Congress having preempted the field by enacting the National Act, is, of itself, and coupled with the past differences in policies of the two Boards, sufficient conflict to invalidate the State Act. In the words of Mr. Chief Justice White, in *New York Central R.R. Co. v. Board of Chosen Freeholders of the County of Hudson*, 227 U. S. 248, 264 (1913):

> "The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate."

In such a conflict the State Act must give way, even were there no conflicting Board decisions or policies. When the Congress has properly outlined the jurisdiction of the National Board, attempts by the State to invade that jurisdiction are unconstitutional.

Further, the conflict arising from the establishment of the two different Boards lies in the burden which would be placed upon interstate commerce and those engaged therein by such a dual system of regulation. Though the State Act by itself might not be an improper burden upon interstate commerce, the imposition of the State Act on top of the National Act is a real burden. In *Houston v. Moore*, 5 Wheat. 1 (1820), where there was involved a Pennsylvania statute penalizing failure to serve in the militia when so ordered by the President, an offense already punishable under Federal law, Mr. Justice Washington said, in part (at pages 22-23):

> "This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim. If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depositary of them,

and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive, how they can both consist harmoniously together."

Subjection to the operation of two laws upon the same subject, dictated by distinct wills, is burdensome and oppressive.

". . . The state statute and the national law operate upon the same subject-matter, and prescribe different rules concerning it. The national law is unquestionably one within the competency of Congress to enact under the power given to regulate commerce between the States. The state statute must, therefore, give way." (*Gulf, Colorado & Santa Fé Ry. Co. v. Hefley*, 158 U.S. 98, 105 (1895), per Brewer, J.)

There are many cases in which the courts have refused to enforce a State statute which was held to impinge upon the exclusive jurisdiction of the Congress over the field of interstate commerce.

Thus, in *Gulf, Colorado & Santa Fé Ry. Co. v. Hefley*, 158 U.S. 98 (1895), the United States Supreme Court held that

a Texas statute making it unlawful for a railroad to collect a greater sum for transporting goods than the amount specified in the bill of lading covering the shipment could not be validly applied to an interstate shipment.

In *Northern Pacific Railway Co. v. State of Washington*, 222 U.S. 370 (1912), the United States Supreme Court held invalid a State law regulating hours of service of railway employees, the provisions of which the Court stated "greatly resembled" those of an Act of the Congress which had been passed but was not to take effect until a subsequent date.

In *Second Employers' Liability Cases*, 223 U. S. 1 (1912) the United States Supreme Court held that the Federal Employers' Liability Act superseded the laws of the States in so far as they purported to cover the same field.

In *Chicago, Rock Island & Pacific Railway Company v. Hardwick Farmers Elevator Company*, 226 U.S. 426 (1913), the United States Supreme Court held invalid a State statute which made it the duty of a carrier on demand by a shipper to furnish cars for transportation of freight within 72 hours after such demand. The Hepburn Act, passed by the Congress, also impressed a duty on carriers to provide and furnish transportation upon reasonable request. The Court held that the State statute was invalid.

In *St. Louis, Iron Mountain & Southern Railway Company v. Edwards*, 227 U. S. 265 (1913), the issue was the enforceability of penalties imposed under an Arkansas statute which required carriers to give notice to consignees of the arrival of freight. The Federal Hepburn Act imposed a duty upon the carriers to deliver freight to consignees. The United States Supreme Court held that penalties imposed under the State statute in respect of interstate shipments were unenforceable.

In *Erie R.R. Co. v. New York*, 233 U. S. 671 (1914), a statute of the State of New York, which limited the hours

of work of railroad employees to less than that allowed by the Federal Hours of Service Act was held unconstitutional in so far as it applied to interstate commerce.

In *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439 (1915), the United States Supreme Court held invalid a regulation of the State of Indiana which required every carrier properly to equip its cars with grab-irons and hand-holds. The Federal Safety Appliance Act also required carriers to equip their cars with hand-holds. The Court declared that the Indiana regulation was invalid.

In *Pennsylvania Railroad Company v. Public Service Commission of Pennsylvania*, 250 U. S. 566 (1919), the Railroad operated a train in interstate commerce, the last car of which was not equipped with a platform as required by the Pennsylvania Public Service Commission, acting under a Pennsylvania statute. The car was, however, constructed in accordance with the regulations of the Post Office Department and the Interstate Commerce Commission. The Supreme Court of the United States set aside a conviction of the Railroad for a violation of the State law on the ground that the Federal law was supreme and that compliance with it was sufficient.

In *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605 (1926), requirements of a Georgia statute regarding an automatic door to the firebox on locomotives and of the Wisconsin Railroad Commission regarding curtains on locomotive cabs, were held invalid because they went beyond the equipment required by the Interstate Commerce Commission. It was admitted in that case that the State requirements were imposed in the exercise of the police power of the States and that devices prescribed by the States would protect the enginemen and also indirectly increase the safety of all those on the train and even others. Nevertheless, the railroads were held not bound to comply with the State requirements.

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197 (1938), the principal question was whether the National Board had jurisdiction over the Consolidated Edison Company, the operations of which were wholly within New York State, but which affected interstate commerce. The Company argued that the legislature of the State of New York had adopted a State labor relations act (the Act the validity of which is here questioned) which comprehensively and adequately provided protection against the interruption of the Company's services through labor disputes. This argument was rejected and the Company was held subject to the jurisdiction of the National Board, the Court, through Mr. Chief Justice Hughes, saying, in part (at page 223):

> "It is manifest that the enactment of this state law could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority."

In *Cloverleaf Butter Co. v. Patterson, Commissioner of Agriculture and Industries of Alabama*, 315 U. S. 148 (1942), state authorities were enjoined from confiscating renovated butter in plaintiff's factory or warehouses in Alabama or otherwise interfering with plaintiff's reprocessing of such butter which was moving in interstate commerce, because under Federal legislation the Federal Department of Agriculture had authority to safeguard the consumer's interests throughout the process of manufacture and distribution, including the supervision of the sanitation of the plants and the workers, inspecting the ingredients and confiscating the finished product when unwholesome.

In the recent case of *Hill v. Florida*, 325 U. S. 538 (1945), a Florida statute was held invalid on the ground that it circumscribed the "full freedom" of choice of collective bargaining agents which is secured to employees by the National Labor Relations Act.

In *Public Utilities Commission of Ohio, et al. v. United Fuel Gas Co., et al.*, 317 U. S. 456 (1943), the United States Supreme Court affirmed a decree of the United States District Court for the Southern District of Ohio enjoining the enforcement of orders of the Public Utilities Commission of Ohio requiring United Fuel Gas Company to prepare and present to such Commission "all pertinent and relevant testimony and exhibits tending to prove a reasonable and just rate to be charged by it to the Portsmouth Gas Company for the furnishing of natural gas for distribution within the City of Portsmouth, Ohio."

That case is especially pertinent here, because there as in the instant case an administrative agency of the State was seeking to compel the production of evidence in a controversy in respect of which such agency did not have jurisdiction to act.

In *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U. S. 87 (1926), the contention was made that, in the absence of an exercise by the Secretary of Agriculture of his statutory power to impose a quarantine on diseased and insect-carrying trees and plants in interstate commerce, the State of Washington could effect a quarantine of alfalfa to prevent the threatened spreading of a particular type of weevil. This contention the Court rejected, on the ground that the passage of the Federal quarantine law prevented or suspended the power of the States to act.

The National Board itself has held that a State Act must yield before the paramount authority of the Congress expressed in a valid and applicable Federal law (*Matter of Eppinger & Russell Company and Florida Citrus & Allied Workers Union Local 4A, U.C.A.P.A.W.A., C.I.O.*, 56 N.L.R.B. 1259 (1944)).

In that case an employer before the National Board defended its refusal to bargain with a duly selected repre-

sentative of its employees on the ground that the representative had not secured a Florida license as a business agent (see *Hill v. Florida*, 325 U. S. 538 (1945)).

In rejecting the employer's argument the National Board said in part (at page 1260):

> "* * * There is no question but that the National Labor Relations Act constitutionally applies to this respondent, and hence the sole inquiry must be whether Congress meant that the duty of employers to bargain, as provided in Section 8(5) of the Act, should turn on the requirements of such State legislation. No doubt Congress could have so provided, even though this would have subjected the enforcement of legislation national in scope to the varied and perhaps conflicting provisions of State enactments; but we find nothing in the language of the Act or its legislative history which warrants the belief that Congress in fact did so provide. We therefore conclude that the respondent's contention is without merit. * * *"

In its decision the National Board relied upon the following cases:

Hines v. Davidowitz,
312 U. S. 52 (1941);
Cloverleaf Butter Co. v. Patterson,
315 U. S. 148 (1942);
Napier v. Atlantic Coast Line Railroad Company,
272 U. S. 605 (1926);
Oregon-Washington Railroad & Navigation Co. v. State of Washington,
270 U. S. 87 (1926);
Charleston & W. C. Railway Co. v. Varnville Furniture Co.,
237 U. S. 597 (1915);
National Labor Relations Board v. Hearst Publications, Inc.,
322 U. S. 111 (1944).

In *Matter of Evinrude Motors Division of Outboard Marine and Manufacturing Company and United Steel-*

workers of America, C.I.O., Case No. 13-R-5236, 66 N.L.R.B. No. 138 (March 25, 1946), the National Board took jurisdiction of a case for the determination of a bargaining unit although the Wisconsin Employment Relations Board had already made a determination. The National Board pointed out that, under Wisconsin law, the Wisconsin Board was required to establish a craft unit if a craft group existed among the employees involved. The National Act, however, makes the existence of a craft only one of the factors in the determination of an appropriate unit. The National Board established an industrial unit despite the prior establishment by the Wisconsin Board of a craft unit, holding that the National Board must prevail over the Wisconsin Board.

There are many other cases in which the United States Supreme Court has refused to enforce State statutes that were held to infringe upon the exclusive jurisdiction of the Congress over the field of interstate commerce. Among such cases are the following:

Southern Railway Co. v. Reid,
222 U. S. 424 (1912);
Adams Express Company v. Croninger,
226 U. S. 491 (1913);
New York Central Railroad Company v. Winfield,
244 U. S. 147 (1917);
Missouri Pacific Railroad Company v. Stroud,
267 U. S. 404 (1925);
Missouri Pacific Railroad Company v. Porter, et al.,
273 U. S. 341 (1927);
Hines v. Davidowitz,
312 U. S. 52 (1941);
Illinois Natural Gas Co. v. Central Illinois Public Service Co., et al.,
314 U. S. 498 (1942).

From the foregoing cases it is apparent that the police power of the State of New York would warrant the application of the State Act to the labor relations of the Company if the National Act were not in existence (*The Minnesota Rate Cases*, 230 U. S. 352 (1913)). On the other hand, it is

equally well settled that when there is a conflict between a statute enacted by the Congress pursuant to its delegated powers and a law adopted by the State in the exercise of its police powers, then the former prevails (*Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Erie R.R. Co. v. New York*, 233 U. S. 671 (1914)).

It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the State or Federal government may act (*Willson v. Black-bird Creek Marsh Co.*, 2 Pet. 245 (1829); *California v. Thompson*, 313 U. S. 109 (1941)).

In cases where there is only a partial exercise of Federal regulation, the State may legislate freely upon those phases of the commerce which are left unregulated by the Nation (*Merchants Exchange of St. Louis v. Missouri*, 248 U. S. 365 (1919); *Welch Co. v. New Hampshire*, 306 U. S. 79 (1939)).

But when the United States exercises its power of legislation, State legislation on the same subject becomes inoperative and the Federal legislation is exclusive in its application (*Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605 (1926); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942)). It follows logically, therefore, that in the absence of affirmative consent a Congressional negative should be presumed in the courts against state action when the Congress has previously acted (see Dowling, *Interstate Commerce and State Power* (1940), 27 Va. L. Rev. 1, 20).

C. The Rulings of the State Board Under the State Act Have Not in the Past Been in Conformity With the Rulings of the National Board With Respect to Foremen and There Is No Assurance of Conformity in the Future.

The fact that the State Act purports to apply to a controversy within the scope of the National Act gives rise to the very danger of interference with the jurisdiction of the Congress over interstate commerce which Clause 2 of

Article VI of the Federal Constitution is intended to prevent. Experience has demonstrated that, when two separate governmental agencies seek to apply two separate statutes to the same kind of controversies, inconsistencies and confusion are bound to result.

Thus, the State Board has repeatedly held that, under the provisions of Section 705 of the State Act, supervisory employees constitute a unit appropriate for the purposes of collective bargaining and that the establishment of such collective bargaining units will effectuate the policies of the State Act.

> *Matter of Williamsburgh Power Plant Corp.*, 1 N.Y.S.L.R.B. 653 (1938);
> *Matter of Siegel & Fried, Inc.*, 3 N.Y.S.L.R.B. 150 (1940);
> *Matter of Metropolitan Life Insurance Company*, 6 N.Y.S.L.R.B. 751 (1943).

The National Board, on the other hand, held until recently that, under the provisions of Section 9 of the National Act, supervisory employees did not constitute a unit appropriate for the purposes of collective bargaining. (*Matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America*, 49 N.L.R.B. 733 (1943)).

In that case the National Board dismissed petitions for the investigation and certification of representatives of supervisory employees on the ground that such employees did not constitute a unit appropriate for the purposes of collective bargaining. The National Board said, in part (at pages 741 to 742):

> "The legislative history of the National Labor Relations Act indicates that the conditions which prevailed in the mass production industries were the primary factors which led to its enactment. In these industries it was traditionally recognized by all parties that the interests of foremen lay predominantly with the management groups. We are of the opinion

that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act. To the extent that our decisions in the *Union Collieries, Godchaux Sugar*, and subsequent cases are inconsistent with this opinion, they are hereby overruled. ***" (Underscoring added.)

That interpretation and application of the provisions of Section 9 of the National Act was reaffirmed by the National Board in a number of subsequent decisions:

Matter of Boeing Aircraft Company and Association of Aircraft General Foremen, et al., 51 N.L.R.B. 67 (1943);

Matter of General Motors Corporation and Foreman's Association of America, 51 N.L.R.B. 457 (1943);

Matter of Capital City Telephone Company and Local B-2, International Brotherhood of Electrical Workers, A.F.L., 56 N.L.R.B. 1200 (1944).

In the *General Motors* case above cited, in which the Foreman's Association was the petitioner, the National Board said, in part (at pages 459, 460):

"It is urged that the doctrine established in the *Maryland Drydock* case should be limited to the fact situation therein presented and that the instant case be differentiated on the ground that the union seeking to represent the supervisory employees is an independent labor organization not affiliated with the union which represents the production and maintenance employees. We have given careful consideration to this contention but are not persuaded that the factors militating against the establishment of units of supervisory employees, set forth in our decision in the *Maryland Drydock* case, are obviated by the cir-

cumstance that the union seeking to represent such employees is an independent, unaffiliated union. ***"

In a decision handed down on March 26, 1945, in *Matter of Packard Motor Car Company and Foreman's Association of America*, 61 N.L.R.B. 4, the National Board, to some extent, at least, overruled its decision in the *Maryland Drydock* case and found that "all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act." That decision did not, however, entirely eliminate the conflict between the rulings of the State Board and those of the National Board. The State Board has held that supervisory employees may designate as their collective bargaining agency a labor organization that represents the non-supervisory employees of their employer.* The National Board specifically left that question open in its decision in the *Packard Motor Car Company* case, and only recently aligned its policy with that of the State Board (*Jones & Laughlin Steel Corporation, Vesta-Shannopin Coal Division and United Clerical, Technical and Supervisory Employees Union of the Mining Industry, Division of District 50, United Mine Workers of America*, 66 N.L.R.B. No. 51, (March 8, 1946)).

The Circuit Court of Appeals for the 6th Circuit, however, has recently indicated that a union which represents the production employees of a company for the purposes of collective bargaining cannot, under the National Act, properly represent the supervisory employees of such com-

* See, e.g. *Matter of Metropolitan Life Insurance Co.*, 6 N.Y.S.L.R.B. 751 (1943); *Matter of Delparke Realty Corp.*, 6 N.Y.S.L.R.B. 905 (1943); *Matter of Bee Line, Inc.*, 6 N.Y.S.L.R.B. 686 (1943).

pany. In *National Labor Relations Board v. Packard Motor Car Company,* F. (2d) (August 12, 1946), the Court said in part:

> "Since the union involved is independent and neither a part of nor controlled by the union representing the production workers, we also uphold the decision as to the propriety of the exclusive bargaining representative named by the Board. This is a situation diametrically opposite to that presented in Jones & Laughlin Steel Corp. v. National Labor Relations Board, *supra*, where the bargaining agent designated was the identical union which represented the production workers. As found by the panel of the War Labor Board, it is not appropriate for supervisors who are responsible for discipline, assignment of work, rate adjustments and promotions, who represent the employers in handling grievances of rank and file workers, and who generally represent higher management in dealing with the rank and file workers, to be subject to discipline by a union which is controlled directly or indirectly by the men whom they supervise. The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management."

As an example of another conflict between the National Act and the State Act, the State Board in a proceeding under the State Act has included guards, patrolmen and watchmen in a unit certified to be appropriate for the purposes of collective bargaining (*Matter of Knickerbocker Village, Inc., et al.*, 5 N.Y.S.L.R.B. 23 (1942); *Matter of Empire State, Inc.*, 5 N.Y.S.L.R.B. 692 (1942)).

The Federal Courts, however, construing the National Act, have held that guards are not "employees" within the meaning of the National Act (*National Labor Relations Board v. E. C. Atkins & Co.*, 147 F. (2d) 730 (C.C.A. 7th, 1945); 325 U. S. 838 (1945); 155 F. (2d) 567 (C.C.A. 7th,

1946); cert. applied for August 20, 1946), and that they do not constitute an appropriate unit within the meaning of such Act (*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 146 F. (2d) 718 (C.C.A. 6th, 1945); 325 U. S. 838 (1945); 154 F. (2d) 932 (C.C.A. 6th, 1946); cert. applied for August 20, 1946).

While at the moment, therefore, certain of the interpretations which the State Board has placed on the State Act are consistent with the interpretations which the National Board has placed on the National Act, other rulings of the State Board under the State Act are in conflict with the provisions of the National Act as interpreted by the Federal Courts. Moreover, there is no assurance of conformity of any of such interpretations in the future.

D. The National Board Has Taken Jurisdiction Over the Matter of the Representation of the Company's Employees at Its Lackawanna Plant.

In the instant case, the record shows affirmatively that, if the Foreman's Association had filed with the National Board a petition for the investigation and certification of representatives of the supervisory employees here involved, the National Board would have assumed jurisdiction of such petition and of the question or controversy here under investigation by the State Board (R. 56).

As we have pointed out, *supra*, page 10, the National Board has heretofore determined in five cases that the National Act applies to the Lackawanna Plant and to questions or controversies concerning the representation of certain non-supervisory employees of the Company at that Plant (R. 51).

By such determinations the National Board has ousted the State Board of jurisdiction to determine any controversy with respect to the representation for the purposes of collective bargaining of any employees of the Company.

Such exercise of jurisdiction over non-supervisory employees is an assumption of jurisdiction over the foremen as well. The collective bargaining process is not so simple as to make possible the separate consideration of the bargaining rights of rank-and-file employees and those of their immediate supervisors. The foremen are drawn from the rank-and-file and they may return to such group. The National Board cannot determine an appropriate unit for the rank-and-file without considering the rights and position of the foremen. In fact, foremen and other supervisors were, by name, expressly excluded from the units which the National Board determined to be appropriate in those cases. In so far as a particular plant is concerned, the status of one group of employees cannot be considered without consideration of the whole nexus of employer-employee relationships in such plant.

The National Board has also determined that the National Act applies to other plants owned and operated by the Company in other parts of the country and has established a pattern of bargaining units under the National Act with regard to all of the plants owned and operated by the Company (see, e.g. *Matter of Bethlehem Steel Company and United Steelworkers of America, C.I.O.*, 50 N.L.R.B. 713 (1943); *Matter of Bethlehem Steel Company and Local 1845, United Steelworkers of America, C.I.O.*, 46 N.L.R.B. 794 (1943)).

Moreover, the fact that the two Acts may be similar in their language and that the result in any particular case would be the same under either Act does not resolve the conflict of jurisdiction between the Federal government and the State government. That conflict arises from the fact that the two Acts purport to cover the same ground and apply to the same controversy. That conflict can only be resolved, as the Constitution of the United States provides, by recognizing the supremacy of the National Act and

denying to the State Act any application to the particular controversy.

This is not a case in which the State Board is attempting to enforce a Federal statute. The State Board here seeks to apply the State Act to a controversy which clearly falls within the scope of the National Act and in such a case the Federal Constitution provides that the National Act is supreme and, therefore, must have exclusive application.

CONCLUSION

It is, therefore, submitted that the State Act cannot properly be construed so as to confer upon the State Board jurisdiction over the subject-matter of the State Board proceeding, because, if the State Act should be so construed, it would be contrary to the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States. Accordingly, the Orders appealed from should be reversed and the application of the State Board herein for an order enforcing its subpoena *duces tecum* and subpoenas should be denied with costs, because the State Board does not have jurisdiction over the subject-matter of the State Board proceeding.

Respectfully submitted,

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October 21, 1946.

APPENDIX A

PERTINENT PROVISIONS OF THE NEW YORK STATE LABOR RELATIONS ACT

(Laws of 1937, Chapter 443; amend. Laws of 1942, Chapter 518)

700. Findings and policy.

The economic necessity for employees to possess full freedom of association, actual liberty of contract and bargaining power equal to that of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained. It is likewise recognized that the denial by some employers of the right of employees freely to organize and the resultant refusal to accept the procedure of collective bargaining, substantially and adversely affect the interest of employees, other employers, and the public in general. Such denial creates variations and instability in competitive wage rates and working conditions within and between industries and between employees and employers engaged in such industries, and by depressing the purchasing power of wage earners and the profits of business, and tends (a) to produce and aggravate recurrent business depressions, (b) to increase the dis-

parity between production and consumption, (c) to create unemployment with its attendant dangers to the health, peace and morale of the people, and (d) to increase public and private expenditures for relief of the needy and the unemployed.

When some employers deny the right of employees to full freedom of association and organization, and refuse to recognize the practice and procedure of collective bargaining, their actions lead to strikes, lockouts and other forms of industrial strife and unrest which are inimical to the public safety and welfare, and frequently endanger the public health.

Experience has proved that protection by law of the right of employees to organize and bargain collectively, removes certain recognized sources of industrial strife and unrest, encourages practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and tends to restore equality of bargaining power between and among employers and employees, thereby advancing the interests of employers as well as employees.

In the interpretation and application of this article, and otherwise, it is hereby declared to be the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.

All the provisions of this article shall be liberally construed for the accomplishment of this purpose.

This article shall be deemed an exercise of the police power of the state for the protection of the public welfare,

prosperity, health and peace of the people of the state. (As amended by Chapter 689 of the Laws of 1940.)

701. Definitions.

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly, with or without his knowledge, but a labor organization or any officer or agent thereof shall only be considered an employer with respect to individuals employed by such organization.

3. The term "employees" includes but is not restricted to any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and shall not be limited to the employees of a particular employer, unless the article explicitly states otherwise, but shall not include any individual employed by his parent or spouse or in the domestic service of any person in his home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers.

4. The term "representatives" includes a labor organization or an individual whether or not employed by the employer of those whom he represents.

5. The term "labor organization" means any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection and which is not a company union as defined herein.

6. The term "company union" means any committee, employee representation plan or association of employees which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment, which the employer has initiated or created or whose initiation or creation he has suggested, participated in or in the formulation of whose governing rules or policies or the conducting of whose management, operations or elections, the employer participates in or supervises or which the employer maintains, finances, controls, dominates, or assists in maintaining or financing, whether by compensating anyone for services performed in its behalf or by donating free services, equipment, materials, office or meeting space or anything else of value, or by any other means.

7. The term "unfair labor practice" means only those unfair labor practices listed in section seven hundred four.

8. The term "labor dispute" includes, but is not restricted to, any controversy between employers and employees or their representatives as defined in this section concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to negotiate, fix, maintain or change terms or conditions of employment, or concerning the violation of any of the rights granted or affirmed by this article, regardless of whether the disputants stand in the proximate relation of employer and employee.

9. The term "board" means the labor relations board created by section seven hundred two.

10. The term "policies of this article" means the policies set forth in section seven hundred.

703. Rights of employees.

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section. (As amended by Chapter 773 of the Laws of 1940.)

704. Unfair labor practices.

It shall be an unfair labor practice for an employer:

1. To spy upon or keep under surveillance, whether directly or through agents or any other person, any activities of employees or their representatives in the exercise of the rights guaranteed by section seven hundred three.

2. To prepare, maintain, distribute or circulate any blacklist of individuals for the purpose of preventing any of such individuals from obtaining or retaining employment because of the exercise by such individuals of any of the rights guaranteed by section seven hundred three.

3. To dominate or interfere with the formation, existence, or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment, labor disputes or grievances, or to contribute financial or other support to any such organization, by any means, including but not limited to the following: (a) by participating or assisting in, supervising, controlling or dominating (1) the initiation or creation of any such employee organization or association, agency, or plan, or (2) the meetings, management, operation, elections, formulation or amendment of constitution, rules or policies, of any such employee organization or association, agency or plan; (b) by urging the employees to join any such

employee organization or association, agency or plan for the purpose of encouraging membership in the same; (c) by compensating any employee or individual for services performed in behalf of any such employee organization or association, agency or plan, or by donating free services, equipment, materials, office or meeting space or anything else of value for the use of any such employee organization or association, agency or plan; provided that, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

4. To require an employee or one seeking employment, as a condition of employment, to join any company union or to refrain from forming, or joining or assisting a labor organization of his own choosing.

5. To encourage membership in any company union or discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment: Provided that nothing in this article shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein, if such labor organization is the representative of employees as provided in section seven hundred five.

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

7. To refuse to discuss grievances with representatives of employees, subject to the provisions of section seven hundred five.

8. To discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article.

9. To distribute or circulate any blacklist of individuals exercising any right created or confirmed by this article or of members of a labor organization, or to inform any person of the exercise by any individual of such right, or of the membership of any

individual in a labor organization for the purpose of preventing individuals so blacklisted or so named from obtaining or retaining employment.

10. To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

705. Representatives and elections.

1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft shall so decide the board shall designate such craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice,

either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate any question or controversy between individuals or groups within the same labor organization or between labor organizations affiliated with the same parent labor organization.

4. The board shall have power to determine who may participate in the election and to establish the rules governing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance.

708. Investigatory powers.

For the purpose of all hearings and investigations, which, in the opinion of the board, are necessary and proper for the exercise of the powers vested in it by sections seven hundred five and seven hundred six,

1. The board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purposes of examination, and the right to examine, copy or photograph any evidence, including payrolls or lists of employees, of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the board, its member, agent, or agency, conducting the hearing or investigation. Any member of the

board, or any agent or agency designated by the board for such purposes, may administer oaths and affirmations, examine witnesses and receive evidence.

2. If any witness resides outside the state, or through illness or other cause is unable to testify before the board or its member, agent, or agency conducting the hearing or investigation, his or her testimony or deposition may be taken within or without this state, in such manner and in such form as the board or its member, agent or agency conducting the hearing may by special order or general rule prescribe.

3. In case of contumacy or refusal to obey a subpoena issued to any person the supreme court of any county within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the board shall have jurisdiction to issue to such person an order requiring such person to appear before the board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

4. No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

5. Complaints, orders, and other process and papers of the board, its member, agent, or agency,

may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post-office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the board, its member, agent, or agency shall be paid the same fees and mileage that are paid witnesses in the courts of this state, and witnesses whose depositions are taken and the person taking the same shall severally be entitled to the same fees as are paid for like services in the courts of this state.

6. All process of any court to which application may be made under this article may be served in the county wherein the person or persons required to be served reside or may be found.

7. The several departments, commissions, divisions, authorities, boards, bureaus, agencies and officers of the state or any political subdivision or agency thereof, shall furnish the board, upon its request, all records, papers, and information in their possession relating to any matter before the board.

715. Application of article.

The provisions of this article shall not apply to the employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act or to employees of the state or of any political or civil subdivision or other agency thereof, or to employees of charitable, educational or religious associations or corporations.

716. Short title.

This article shall be known and may be cited and referred to as the "New York state labor relations act."

APPENDIX B

PERTINENT PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

Findings and Policy

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce, and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Definitions

SEC. 2. When used in this Act —

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose

work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the

disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any

labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Representatives and Elections

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 16. This Act may be cited as the "National Labor Relations Act."